



6-1-2013

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Recommended Citation

Brooke D. Coleman, *Prison Is Prison*, 88 Notre Dame L. Rev. 2399 (2013).

Available at: <http://scholarship.law.nd.edu/ndlr/vol88/iss5/13>

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ARTICLES

PRISON IS PRISON

Brooke D. Coleman*

*Two indigent men stand before two separate judges. Both will be sent to prison if they lose their cases. One receives appointed counsel, but the other does not. This discrepancy seems terribly unjust, yet the Supreme Court has no problem with it. It recently affirmed in *Turner v. Rogers*, that where an indigent individual is subject to criminal charges that can result in incarceration, he has a right to appointed counsel, but where an indigent individual is subject to civil proceedings where incarceration is a consequence, he does not. In other words, criminal and civil proceedings have different rules, and the right to appointed counsel is no exception. This Article argues that because the consequence of these proceedings is exactly the same, the right to appointed counsel should be the same. Prison is prison. This consequence, and not just doctrinal distinctions, should guide the Court's analysis in deciding whether an indigent individual receives appointed counsel. By systematically examining the Court's narratives in both criminal and civil right-to-counsel cases, this Article seeks to determine why the Court continues to treat the same situation so differently. The Court states that it is driven solely by doctrine, but it uses radically different language to discuss the individuals, attorneys, and nature of the proceedings in the criminal versus civil setting. This Article argues that the Court's different goals in the criminal and civil context better explain the Court's approach than doctrinal distinctions alone. With criminal cases, its goal is legitimacy, while with civil cases, its primary goal is efficiency. This Article questions the Court's "doctrine-oriented" approach in the civil context, and argues that what the Court is really doing is allowing its treatment of cases in the broader civil justice system to affect its jurisprudence in this context. It does this even when the consequence of a typical civil case is so different. After all, the result in a case like *Turner* is prison, not monetary damages or injunctive relief. Instead of taking this doctrine-oriented approach, this Article argues that the Court's analysis should be "consequence-driven." Where prison is the conse-*

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quence, the Court's underlying analysis of right to counsel should be the same whether the proceeding is criminal or civil. Using the Court's decision in Turner, the Article shows how a consequence-driven approach could have changed the result in that case.

INTRODUCTION

The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. . . . He requires the guiding hand of counsel at every step in the proceedings against him.¹

The introduction of counsel into a . . . proceeding will alter significantly the nature of the proceeding. . . . Certainly, the decisionmaking process will be prolonged, and the financial cost to the State . . . will not be insubstantial.²

Two men stand before judges in two separate courtrooms. They are indigent so they cannot afford a lawyer. Each judge decides that counsel should not be appointed to them and proceeds to hold their hearings. They are each sentenced to a year in prison for their alleged offenses. After sentencing, they each find pro bono attorneys and appeal their cases to the Supreme Court. In the case of the first man, the Court determines that the failure of the trial court to provide counsel was fatal. After all, “[c]ounsel is needed so that the accused may know precisely what he is doing, so that he is fully aware of the prospect of going to jail or prison, and so that he is treated fairly”³ In the case of the second man, however, the result is markedly different. There, the Court rejects the requirement of counsel, holding that the issue in his case was “sufficiently straightforward to warrant determination” without the help of an attorney.⁴ How is it that two men—subject to the same prison sentence—can be treated so differently? The answer is surprisingly simple. One has been criminally charged while the other is subject to a civil proceeding.

This Article is the first to argue that prison is prison⁵—that the consequences of criminal and civil proceedings, not any facial differences between the two, should govern whether the right to counsel attaches. It fills a gap in the literature on Civil Gideon⁶ to show that the Court’s justification for treat-

1 Powell v. Alabama, 287 U.S. 45, 68–69 (1932).

2 Gagnon v. Scarpelli, 411 U.S. 778, 787–88 (1973).

3 Argersinger v. Hamlin, 407 U.S. 25, 34 (1972).

4 Turner v. Rogers, 131 S. Ct. 2507, 2519 (2011).

5 “Prison” is a place of confinement for individuals incarcerated for longer periods of time, while “jail” is a place of confinement for individuals incarcerated for shorter periods, often by local jurisdictions. Sharon Dolovich, *Strategic Segregation in the Modern Prison*, 48 AM. CRIM. L. REV. 1, 4 n.14 (2011). The Article uses the term “prison” generally to refer to any sentence of incarceration, including prison, jail, detention, and related terms.

6 “Civil Gideon” is the name given to a broad court-based and legislative movement arguing that when indigent individuals’ basic human needs are at stake, appointed counsel should be provided. Dennis A. Kaufman, *The Tipping Point on the Scales of Civil Justice*, 25 Touro L. REV. 347, 366 n.44 (2009).

ing criminal and civil cases differently does not rest on solid ground. This Article systematically examines the narratives the Court uses regarding right to counsel in the civil and criminal context. By laying out the Court's diametrically-opposed language, this Article confronts how differently the Court describes what lawyers contribute to the adjudication process. This Article argues that the Court must know that it is being inconsistent, but it accepts this inconsistency as the necessary means to achieve different results in the two regimes. On the criminal side, the Court is primarily concerned with ensuring the system is legitimate. On the civil side, however, the Court is concerned with efficiency. These end results—legitimacy in the criminal context and efficiency in the civil one—drive the Court's persistent use of opposing narratives in what are otherwise identical situations.

Gideon v. Wainwright,⁷ and the foundational right to counsel it created, will celebrate its fiftieth anniversary this year; yet, an untold number of indigent individuals in the civil justice system will have nothing to celebrate. The Court recently confirmed in *Turner v. Rogers* that indigent individuals in civil cases have no right to counsel, even when prison is the consequence.⁸ The Court's reasoning is based on doctrinal differences—distinctions driven by the Sixth and Fourteenth Amendments. However, many scholars have argued that the reasoning for providing counsel in the criminal context equally applies in the civil one.⁹ The issues in civil cases can be complex and

7 372 U.S. 335 (1963).

8 *Turner*, 131 S. Ct. at 2512. As will be discussed in Part III.D, Mr. Turner was an indigent man who was imprisoned for serial terms of up to a year each because of his failure to pay child support. *Id.* at 2513. The implications of his case are far broader than child support, however. Imprisonment resulting from civil proceedings is on the rise. See Ethan Bronner, *Poor Land in Jail as Companies Add Huge Fees for Probation*, N.Y. TIMES, July 3, 2012, at A1, available at <http://www.nytimes.com/2012/07/03/us/probation-fees-multiply-as-companies-profit.html?pagewanted=all> (examining how private companies hired by municipalities to collect outstanding fees for minor infractions are pursuing jail sentences for individuals who fail to pay those fines); Ethan Bronner, *Right to Lawyer Can Be Empty Promise for Poor*, N.Y. TIMES, March 16, 2013, at A1, available at <http://www.nytimes.com/2013/03/16/us/16gideon.html?ref=ethanbronner&r=0> (discussing how *Gideon* did not extend to civil matters, meaning that many poor people are without counsel in cases involving foreclosure, civil contempt, and spousal abuse); Susan An, *Unpaid Bills Land Some Debtors Behind Bars* (National Public Radio broadcast Dec. 12, 2011), available at <http://www.npr.org/2011/12/12/143274773/unpaid-bills-land-some-debtors-behind-bars> (examining how individuals are increasingly being imprisoned for failure to pay outstanding debts owed to private companies).

9 See, e.g., Simran Bindra & Pedram Ben-Cohen, *Public Civil Defenders: A Right to Counsel for Indigent Civil Defendants*, 10 GEO. J. ON POVERTY L. & POL'Y 1, 2 (2003) (arguing for a civil public defenders' office because indigent individuals need protection and access); Russell Engler, *Connecting Self-Representation to Civil Gideon: What Existing Data Reveal About When Counsel Is Most Needed*, 37 FORDHAM URB. L.J. 37, 44–46 (2010) (examining data in different substantive areas to determine when counsel is helpful and when individuals might be better off with self-representation); Robert Hornstein, *The Right to Counsel in Civil Cases Revisited: The Proper Influence of Poverty and the Case for Reversing Lassiter v. Department of Social Services*, 59 CATH. U. L. REV. 1057, 1062 (2010) (arguing that the Court's decisions in civil right to counsel cases turn on misplaced attitudes regarding “undeserving

the interests at stake significant.¹⁰ What has yet to be critically examined is why—beyond doctrinal distinctions—the Court uses such a different approach, and importantly, such different narratives when it confronts the right to counsel in the criminal context versus the civil one. This Article argues that the Court’s reasoning is affected by its general civil justice jurisprudence. The push for efficiency in traditional civil litigation has resulted in the Court’s distrust of the civil justice system and its lawyers as well as significant concern regarding cost. Instead of taking this “doctrine-oriented” approach, this Article argues the Court should be “consequence-driven.” Where prison is the ultimate consequence, there is simply no justification for treating the right to counsel differently.

Part I of this Article explains the doctrinal differences between the right to counsel in the criminal and civil settings. Part II exposes the variant narratives the Court uses when it describes why lawyers might or might not be necessary to criminal and civil proceedings. This Part also examines why the Court uses different language about the proceedings, the individual, and the value of lawyers when discussing the right to counsel in the civil context versus the criminal one. It argues that the Court’s use of doctrine-oriented language in civil incarceration cases is driven by its treatment of cases in the broader civil justice system. That treatment has affected all civil litigation, including proceedings where prison, not monetary damages, is the result. Part III introduces the Court’s recent decision in *Turner v. Rogers*. It argues that the Court chose to adhere to a doctrine-oriented approach even when Mr. Turner was repeatedly subject to significant incarceration. Next, in Part IV, this Article argues that the Court should have used a consequence-driven approach. When incarceration is the consequence, the Court should analyze the issue of right to counsel in a similar fashion without regard to whether

poor” populations); Paul Marvy & Laura Klein Abel, *Current Developments in Advocacy to Expand the Civil Right to Counsel*, 25 *TOURO L. REV.* 131, 131–32 (2009) (summarizing recent state initiatives and laws requiring appointment of counsel for indigent individuals in a variety of settings, including child custody and housing disputes).

10 See Bindra & Ben-Cohen, *supra* note 9, at 16–18 (arguing that the complexities of criminal proceedings are similar to those involved in civil ones); Hornstein, *supra* note 9, at 1104 (arguing for a right to counsel “because the lack of access to counsel strips the right to be heard of much of its meaning in the context of a civil justice system that is procedurally complex and structured around an attorney-client representational model”). In response to this mounting criticism, the ABA House of Delegates adopted a resolution to find a way “to provide legal counsel as a matter of right at public expense to low income persons in those categories of adversarial proceedings where basic human needs are at stake, such as those involving shelter, sustenance, safety, health or child custody.” Report to the House of Delegates, A.B.A. RES. 112A (2006), *available at* [http://www.legalaidnc.org/public/participate/legal_services_community/ABA_Resolution_onehundredtwelvea\[1\].pdf](http://www.legalaidnc.org/public/participate/legal_services_community/ABA_Resolution_onehundredtwelvea[1].pdf); see also Robert S. Catz & Nancy Lee Firak, *The Right to Appointed Counsel in Quasi-Criminal Cases: Towards an Effective Assistance of Counsel Standard*, 19 *HARV. C.R.-C.L. L. REV.* 397 (1984) (arguing that, based on logic for right to counsel in criminal cases, the right should be expanded to civil cases that are “quasi-criminal”). While Catz and Firak noted the similarities in the issues presented in criminal and so-called quasi-criminal cases, they did not explore why the Court persisted in maintaining distinctions between the two.

the party is subject to criminal or civil proceedings. This Article then uses the *Turner* decision as an example of how a consequence-driven approach would have resulted in the Court finding a right to counsel in that case. Finally, in Part V, this Article addresses the concerns attendant to a consequence-driven approach and argues that even with these concerns, such an approach is justified.

I. HISTORY OF RIGHT TO COUNSEL IN THE CIVIL AND CRIMINAL CONTEXT

There are a number of differences between criminal and civil proceedings, both substantively and procedurally.¹¹ This Article focuses on what is a considerable keystone of our criminal justice system, yet a largely nonexistent aspect of our civil justice system—the right to assistance of counsel for indigent individuals. The Court’s recent decision in *Turner v. Rogers* brings the issue of assistance of counsel in the criminal versus civil setting to the fore.¹² Before discussing the Court’s decision in that case and how it relates to the Court’s decisions in the criminal setting, this Article briefly explains the history of how the right to counsel has developed in both the criminal and civil settings.

A. Criminal: The Sixth Amendment

The right to counsel in federal courts under the Sixth Amendment¹³ was well-established by the 1930s.¹⁴ The Court was reticent to incorporate the Sixth Amendment and apply it to the states, however.¹⁵ A case in the early 1930s indicated the Court might be willing to move in that direction. In *Powell v. Alabama*,¹⁶ nine young African American men were charged with raping two white teenage girls.¹⁷ The men were tried in state court and sentenced to death.¹⁸ The trial court never asked whether they could procure

11 For example, there is a right to a jury trial in criminal cases at both the state and federal level, yet the Seventh Amendment does not apply to the states, so no similar right exists in states in the civil context. Suja A. Thomas, *Nonincorporation: The Bill of Rights After McDonald v. Chicago*, 88 NOTRE DAME L. REV. 159, 162 (2012).

12 See *infra* Part III.

13 The Sixth Amendment provides,

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed; which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

U.S. CONST. amend. VI.

14 See *Johnson v. Zerbst*, 304 U.S. 458 (1938); see also *Betts v. Brady*, 316 U.S. 455, 474 (1942) (Black, J. dissenting) (“[T]he Sixth Amendment makes the right to counsel in criminal cases inviolable by the Federal Government.”).

15 See *infra* notes 23–33 and accompanying text.

16 287 U.S. 45 (1932) (often referred to as the “Scottsboro Boys” case).

17 *Id.* at 49.

18 *Id.* at 50.

counsel and only assigned them counsel on the day of trial.¹⁹ The Court addressed whether these men were denied the right to counsel in violation of the Due Process Clause of the Fourteenth Amendment of the Constitution.²⁰ The Court determined that their due process rights had been violated, stating:

[I]n a capital case, where the defendant is unable to employ counsel, and is incapable adequately of making his own defense because of ignorance, feeble mindedness, illiteracy, or the like, it is the duty of the court, whether requested or not, to assign counsel for him as a necessary requisite of due process of law; and that duty is not discharged by an assignment at such a time or under such circumstances as to preclude the giving of effective aid in the preparation and trial of the case.²¹

Following *Powell*, the question was whether the Court's holding would be expanded to all state criminal trials. The *Powell* Court was explicit about limiting the case to its facts and specifically to the Fourteenth Amendment, but it left the door open for future cases.²² *Betts v. Brady*, decided in 1942, put an end to that conjecture.²³

In that case, Betts was arrested and indicted for robbery in a Maryland state court.²⁴ Betts requested an attorney, but his request was denied because under state law indigent defendants were appointed counsel only when they were charged with murder or rape.²⁵ Betts represented himself, was found guilty, and was sentenced to eight years in prison.²⁶ Betts argued that the court's refusal to appoint counsel violated his due process rights under the Fourteenth Amendment.²⁷ The Court refused to extend *Powell* to find that "in every case, whatever the circumstances, one charged with crime, who is unable to obtain counsel, must be furnished counsel by the State."²⁸ While the Court acknowledged that the Sixth Amendment required the appointment of counsel for indigent defendants in federal court, it noted that considerations under the Fourteenth Amendment were significantly different.²⁹ By looking at the legislative and constitutional history of each of the states, the Court concluded that most states did not require the appoint-

19 *Id.* at 52, 54–56.

20 *Id.* at 50, 52.

21 *Id.* at 71. The Fourteenth Amendment provides in relevant part, "No state shall . . . deprive any person of life, liberty, or property, without due process of law" U.S. CONST. amend. XIV, § 1.

22 *Powell*, 287 U.S. at 71 ("Whether this [finding of a denial of due process within the meaning of the Fourteenth Amendment] would be so in other criminal prosecutions, or under other circumstances, we need not determine.").

23 316 U.S. 455 (1942).

24 *Id.* at 456.

25 *Id.* at 457.

26 *Id.*

27 *Id.* at 461.

28 *Id.* at 462.

29 *Id.* at 465.

ment of counsel.³⁰ The Court surmised that “in the great majority of the States, it has been the considered judgment of the people, their representatives and their courts that appointment of counsel is not a fundamental right, essential to a fair trial.”³¹ Thus, the *Betts* Court did not incorporate the Sixth Amendment.³² It left the determination of right to counsel in the hands of the state judges and legislatures.³³

Over twenty years later, the Court revisited *Betts* in the seminal case of *Gideon v. Wainwright*.³⁴ Clarence Gideon was arrested for breaking and entering with the intent to commit a misdemeanor, a felony under Florida law.³⁵ When he appeared before the trial court, Gideon requested an attorney because he could not afford one.³⁶ The trial judge informed him that state law only required the appointment of counsel when the defendant was charged with a capital offense.³⁷ Gideon represented himself at trial, was found guilty, and later sought habeas relief.³⁸ The Court took the opportunity to re-examine its decision in *Betts* and decided that the case should be overruled.³⁹ The Court argued that *Betts* was the outlier in its jurisprudence regarding right to counsel in criminal cases because it had “departed from the sound wisdom” of *Powell*.⁴⁰ In order to “assure fair trials before impartial tribunals in which every defendant stands equal before the law,” the Court determined that all defendants—not just those who have the means necessary—should be provided with a lawyer.⁴¹

Gideon was initially limited to defendants charged with felony crimes. However, *Argersinger v. Hamlin* expanded the right to indigent defendants no matter the level of alleged crime.⁴² In that case, the indigent defendant was tried for carrying a concealed weapon, a misdemeanor under Florida law punishable with a six-month sentence, \$1,000, or both.⁴³ The Court determined as long as defendants were potentially subject to prison, indigent defendants had a fundamental right to assistance of counsel.⁴⁴

Under these decisions, states were required to provide counsel to indigent defendants charged criminally. This requirement has had a significant impact on the criminal justice system. According to a 1997 study, “seventy-

30 *Id.* at 465–72.

31 *Id.* at 471.

32 *Id.* at 471–72.

33 *Id.* at 472. In *Betts*’s case, the Court determined he received a fair trial and did not require counsel. *Id.* at 472–73.

34 372 U.S. 335 (1963).

35 *Id.* at 336.

36 *Id.* at 337.

37 *Id.*

38 *Id.* at 337–38.

39 *Id.* at 338, 345.

40 *Id.* at 345.

41 *Id.* at 344.

42 407 U.S. 25, 40 (1972).

43 *Id.* at 26.

44 *Id.* at 40.

five percent of defendants facing criminal charges in state court, and sixty percent of those facing criminal charges in federal court, had a publicly financed attorney.”⁴⁵ The criminal justice system, and those who are defendants within it, largely rely on the right to counsel cemented in *Gideon*.⁴⁶

B. Civil: The Fourteenth Amendment

One of the first cases to assess whether indigent individuals should receive counsel in the civil setting was *In re Gault*.⁴⁷ In that case, a fifteen-year-old boy was adjudicated a juvenile delinquent without the assistance of counsel.⁴⁸ In *Gault*, the question was whether the rights attendant to criminal defendants applied in juvenile proceedings, which are civil in nature, but

45 Laura K. Abel, *A Right to Counsel in Civil Cases: Lessons from Gideon v. Wainright*, 15 TEMP. POL. & CIV. RTS. L. REV. 527, 538 (2006).

46 However, the fact that defendants use government-provided attorneys in such great numbers does not mean that the system is a perfect one. There are many successes, such as better training for defense attorneys and better monitoring systems for quality control. Abel, *supra* note 45, at 539. Yet, there have been failures as well. *Id.* at 540–41. In some states, the attorneys defending criminals are not trained in criminal law, or worse, have been sanctioned or disbarred for their general ineptitude. *Id.* at 541. The overwhelming caseloads appointed attorneys are expected to carry, and the related issues of less time to spend with clients and the incentive to plead out quickly, are chronic problems. *Id.* Many of these problems result from a startling lack of funding for indigent defense. *Id.* at 541–42; see also Benjamin Barton, *Against Civil Gideon (And for Pro Se Court Reform)*, 62 FLA. L. REV. 1227, 1251–52 (2010). According to Deborah Rhode, “The United States spends about a hundred billions dollars annually on criminal justice, but only about 2 to 3 percent goes to indigent defense.” DEBORAH L. RHODE, ACCESS TO JUSTICE 123 (2004). And, state governments do not fare any better. Barton, *supra*, at 1252–53. These challenges have, no doubt, had an impact on the legitimacy that the Court’s decisions sought to establish for the criminal justice system. *Id.* at 1262 (“Psychological studies have shown that when a litigant does not feel ‘heard’ in a legal process, they perceive the entire process as fundamentally unfair.”). In the face of these challenges, various policy steps are being taken, and some of those attempts are succeeding. Abel, *supra* note 45, at 542–50. For example, organizations like the American Bar Association have adopted specific guidelines regarding maximum caseloads. *Id.* at 547. To the extent these are observed by particular jurisdictions, they can be incredibly useful. *Id.* At the end of the day, the criminal justice system is lauded for providing attorneys to indigent defendants, but to say that the system is without problems would be misleading. Nonetheless, the legitimacy of the system—in the broader public opinion—is higher because all defendants have the right to legal representation. BELDEN RUSSONELLO & STEWART, DEVELOPING A NATIONAL MESSAGE FOR INDIGENT DEFENSE: ANALYSIS OF NATIONAL SURVEY 30 (October 2001), available at <http://www.nlada.org/DMS/Documents/1211996548.53/Polling%20results%20report.pdf> (revealing survey results that show strong support among citizens surveyed for providing legal help to people who need it but cannot afford it). It goes without saying that individual defendants in the criminal justice system often do not find the system to be legitimate.

47 387 U.S. 1 (1967).

48 *Id.* at 4.

can result in a child being incarcerated until the age of twenty-one.⁴⁹ The Court determined that even though the proceeding was civil,

[t]he juvenile needs the assistance of counsel to cope with problems of law, to make skilled inquiry into the facts, to insist upon regularity of the proceedings, and to ascertain whether he has a defense and to prepare and submit it. The child requires the guiding hand of counsel at every step in the proceedings against him.⁵⁰

The Court noted that while the probation officer was there with the child, he was there as an adversary on behalf of the state.⁵¹ Moreover, the judge could not represent the child.⁵² The Court found that there was no real difference between juvenile proceedings and criminal proceedings against adults because the delinquency hearing was comparable to a criminal trial.⁵³ Thus, the Court determined that the Due Process Clause of the Fourteenth Amendment required both the notification of right to counsel and the provision of counsel if the child could not afford it.⁵⁴

Following *Gault*, one could argue that even when a proceeding was nominally civil, if it was functionally equivalent to an adversarial hearing and could result in one's loss of liberty, then basic rights conferred by due process—rights like assistance of counsel—should attach. That argument was largely rejected in *Gagnon v. Scarpelli*.⁵⁵ In *Scarpelli*, the defendant was on probation from a fifteen year suspended sentence when he was allegedly caught in the midst of a burglary.⁵⁶ He admitted to the burglary, and his probation was revoked by the probation board without a hearing and without consultation with counsel.⁵⁷ His fifteen-year sentence was reinstated.⁵⁸ He challenged the revocation of his probation by arguing that the lack of assistance of counsel violated his due process rights.⁵⁹ The Court rejected a presumption that counsel should always be appointed to an indigent probationer during a revocation hearing.⁶⁰ As opposed to the probation officer in *Gault*, the Court found the officer's duty in the revocation hearing could be supportive.⁶¹ The Court also looked at the hearing's procedural protections, including written notice of the claim, an opportunity to confront and cross-examine witnesses, and a "neutral" fact-finder.⁶² After weighing

49 *Id.* at 34–37.

50 *Id.* at 36 (footnote omitted) (internal quotation marks omitted).

51 *Id.* at 36.

52 *Id.*

53 *Id.*; see *Gagnon v. Scarpelli*, 411 U.S. 778, 789 n.12 (1973) (noting that delinquency proceedings are "functionally akin to a criminal trial").

54 *Gault*, 387 U.S. at 41.

55 411 U.S. 778 (1973).

56 *Id.* at 779–80.

57 *Id.* at 780.

58 *Id.*

59 *Id.*

60 *Id.* at 781.

61 *Id.* at 785.

62 *Id.* at 786.

the nature of the hearing, the role of the probationer's representatives, and the procedural safeguards, the Court rejected a categorical right to counsel in this context.⁶³ Instead, it adopted a case-by-case approach, requiring that each hearing board assess whether counsel is required.⁶⁴

In *Vitek v. Jones*, the Court once again addressed whether a prisoner has a right to counsel when his status changed.⁶⁵ Instead of probation, the question in *Vitek* was whether a prisoner being transferred from prison to a state mental health institution had a right to counsel.⁶⁶ Jones was convicted of robbery and sentenced to up to nine years.⁶⁷ After setting fire to his mattress, mental health officials recommended he be placed in a mental hospital.⁶⁸ Jones challenged this decision, arguing that he should have received notice, a hearing, and appointed counsel before being transferred from prison to the hospital.⁶⁹

The Court, in *Vitek v. Jones*, applied the balancing test announced in *Mathews v. Eldridge* to determine whether due process required the appointment of counsel.⁷⁰ Under *Mathews*, the Court balances the individual's private interests against the government's interest, and then weighs both against the risk of erroneous deprivation of the individual's rights.⁷¹ First, the Court recognized that commitment to a mental institution implicated meaningful liberty interests because of both the confinement and the social stigma of being committed.⁷² The Court also found that the government officials' interests were strong because of the need to protect their officials and other inmates from mentally ill prisoners.⁷³ Finally, the Court found that the risk of error in these commitment proceedings was high, given these interests.⁷⁴ However, the majority split on the question of right to counsel with only four of the Justices voting to require counsel for indigent prisoners in this context.⁷⁵ Justice Powell, the fifth Justice in the judgment, argued that a licensed attorney did not need to be appointed as long as someone with med-

63 *Id.* at 788.

64 *Id.* at 790–91. In Scarpelli's case, the Court determined he might require assistance of counsel. *Id.* at 791. His admission that he had committed another serious crime, according to the Court, was a situation where counsel would not ordinarily be necessary. *Id.* Because Scarpelli had since denied that he made such an admission, however, the Court held that the decision to deny him assistance of counsel should be re-examined in light of the Court's decision. *Id.*

65 445 U.S. 480 (1980).

66 *Id.* at 482–83. The Court also looked at whether he was entitled to other procedural protections such as notice and a hearing. *Id.* at 483.

67 *Id.* at 484.

68 *Id.*

69 *Id.* at 484–85.

70 *Id.* at 499.

71 *Mathews v. Eldridge*, 424 U.S. 319, 334–35 (1976)

72 *Vitek*, 445 U.S. at 491–92.

73 *Id.* at 495.

74 *Id.*

75 *Id.* at 496–97.

ical expertise could assist the prisoner.⁷⁶ Due process, according to Justice Powell, did not require lawyers; it required only “qualified and independent assistance.”⁷⁷

The final case in this collection of “civil” cases preceding *Turner*⁷⁸ did not involve a liberty interest, but instead involved the termination of a mother’s parental rights. *Lassiter v. Department of Social Services*⁷⁹ is an important case, however, because the language the Court used to reject a right to counsel in the *Lassiter* case indicated that when and if a case like *Turner* came before it, the Court would find a right to counsel.⁸⁰

Abby Gail Lassiter had a number of children, but one of her youngest, William, required additional medical care.⁸¹ The doctors at the hospital responsible for William’s care referred Lassiter’s case to the Durham County Department of Social Services.⁸² William was in state custody when Lassiter was charged and convicted of second-degree murder.⁸³ Following her conviction, the Department of Social Services moved to terminate Lassiter’s parental rights.⁸⁴ When she appeared at the termination hearing, Lassiter did not have counsel, nor did she ask for one or allege that she was indigent.⁸⁵ The court terminated Lassiter’s parental rights and she appealed that decision.⁸⁶ She argued she was indigent and, under the Fourteenth Amendment, was entitled to assistance of counsel.⁸⁷

The Court determined that due process did not require the appointment of counsel in every parental rights termination case.⁸⁸ It weighed her interest in her children highly, calling it “commanding,” and it valued the state’s interest in the welfare of the child as high, but it admitted that the cost to the state for providing counsel in these kinds of hearings was fairly low.⁸⁹ Thus, the Court’s analysis turned on the risk of error.⁹⁰ The Court then made two important moves. First, it held that *Scarpelli*’s case-by-case approach applied.⁹¹ While the Court acknowledged that the risk of error in parental right termination hearings could be “insupportably high,” it

76 *Id.* at 499–500 (Powell, J., concurring) (“In sum, although the State is free to appoint a licensed attorney to represent an inmate, it is not constitutionally required to do so. Due process will be satisfied so long as an inmate facing involuntary transfer to a mental hospital is provided qualified and independent assistance.”).

77 *Id.* at 500.

78 *Turner v. Rogers*, 131 S. Ct. 2507 (2011).

79 452 U.S. 18 (1981).

80 *See id.* at 25.

81 *Id.* at 20.

82 *Id.*

83 *Id.* at 20–21.

84 *Id.* at 21.

85 *Id.* at 21–22.

86 *Id.* at 23–24.

87 *Id.* at 24.

88 *Id.* at 33.

89 *Id.* at 27–28.

90 *Id.* at 28.

91 *Id.* at 31–32 (citing *Gagnon v. Scarpelli*, 411 U.S. 778, 788 (1973)).

rejected a blanket rule and instead opted for a case-specific approach.⁹² Second, it looked at the merits of *Lassiter*'s case and determined that "the presence of counsel for Ms. Lassiter could not have made a determinative difference."⁹³ In other words, *Lassiter*'s case was so bad, not even an attorney could have changed the result.⁹⁴

The rejection of a right to counsel in this context was not altogether shocking given the Court's jurisprudence up to this point. What stood out in the *Lassiter* opinion, however, was the Court's recitation of the background law, which included a discussion of right to counsel in both the civil and criminal context.⁹⁵ When the Court turned to its decisions in the civil context, it stated that in cases where it had found a right to counsel (*Gault* and *Vitek*), the key was the potential loss of liberty.⁹⁶ The Court stated that it was the "defendant's interest in personal freedom, and not simply the special Sixth and Fourteenth Amendments right to counsel in criminal cases, which triggers the right to appointed counsel"⁹⁷ The Court added that given these precedents, there is a "presumption that an indigent litigant has a right to appointed counsel only when, if he loses, he may be deprived of his physical liberty."⁹⁸ In the criminal context, the Court similarly noted that the right to counsel only kicked in when there was a loss of liberty and not when the defendant might be required to pay only a fine.⁹⁹

The Court's discussion in *Lassiter* indicated that the issue of appointed counsel turned not on doctrinal distinctions between criminal and civil proceedings, but instead on whether an individual's personal freedom was at stake. *Turner v. Rogers*¹⁰⁰ recently presented this very issue to the Court. Michael Turner was required to make child support payments under a court order.¹⁰¹ Whenever he violated that order, he was held in civil contempt and repeatedly incarcerated for up to a year at a time.¹⁰² Turner, an indigent

92 *Id.*

93 *Id.* at 32–33. As to criminal cases, the Court discussed *Betts*, *Gideon*, and *Argersinger*. *Id.* at 25.

94 For an excellent detailed account of *Lassiter*'s case, see Elizabeth G. Thornburg, Adversarial—*The Story of Lassiter: The Importance of Counsel in an Adversary System*, in CIVIL PROCEDURE STORIES 509 (Kevin M. Clermont ed., 2d ed. 2008); see also Brooke D. Coleman, *Lassiter v. Department of Social Services: Why is it Such a Lousy Case?*, 12 NEV. L.J. 591 (2012) (arguing that *Lassiter* was the worst Supreme Court case).

95 See *Lassiter*, 452 U.S. at 25.

96 *Id.*

97 *Id.*

98 *Id.* at 26–27.

99 *Id.* at 26 (citing *Scott v. Illinois*, 440 U.S. 367, 373 (1979)). The Court also argued that "as a litigant's interest in personal liberty diminishes, so does his right to appointed counsel." *Id.* at 26 (citing *Gagnon v. Scarpelli*, 411 U.S. 778 (1973)). In *Scarpelli*, the prisoner by virtue of his conviction and incarceration had a conditional liberty interest. See *Scarpelli*, 411 U.S. at 781–82. Thus, the loss of personal freedom was not absolute and did not require appointed counsel in that case. *Id.*

100 131 S. Ct. 2507 (2011).

101 *Id.* at 2513.

102 *Id.*

individual, did not receive counsel.¹⁰³ Because of *Lassiter*, many scholars believed that the Court would find a right to counsel in a case like *Turner*.¹⁰⁴ As will be discussed in Part III, however, the Court did not. In Part II, this Article examines why.

II. NARRATIVE DISPARITY AND THE DOCTRINE-ORIENTED APPROACH

The Court has used vastly different narratives in its decisions confronting whether indigent individuals facing time in prison require assistance of counsel. These narratives depend on whether the context is civil or criminal. This Part examines those language differences outside of the context of simply categorizing them as criminal, and thus Sixth Amendment cases, versus civil, and thus Fourteenth Amendment cases. Doing so reveals that the Court engages facial doctrinal distinctions instead of focusing on the fairness that is required no matter the Constitutional Amendment that applies.¹⁰⁵ In the civil context, the Court uses this “doctrine-oriented” approach, and this Part further examines why the Court adheres to its civil justice system narrative even when the consequence of the proceeding is prison.

A. Criminal Cases: Legitimacy and Protection

The Court uses strong language to describe the role and necessity of lawyers in the criminal justice system.¹⁰⁶ This Article argues that the Court is motivated by a desire to lend legitimacy to the criminal justice system and

103 *Id.*

104 See, e.g., Bindra & Ben-Cohen, *supra* note 9, at 14–15; Catz & Firak, *supra* note 10, at 455 (“[C]ases such as *Lassiter* recognize that quasi-criminal litigants suffer loss of ‘liberty’ interests to some extent similar to those of criminal defendants for purposes of assigning the right to counsel . . .”). Seven circuits determined that in civil contempt hearings involving incarceration, indigent contemnors should receive appointed counsel. See Elizabeth G. Patterson, *Civil Contempt and the Indigent Child Support Obligor: The Silent Return of Debtor’s Prison*, 18 CORNELL J.L. & PUB. POL’Y 95, 138–39 (2008). Half of the state legislatures passed laws requiring the same. *Id.*

105 The doctrinal distinctions are no small issue, and the point is not to underestimate them. It is true that in *Betts* the Court was deciding whether to incorporate the Sixth Amendment through the Fourteenth Amendment and apply the foundational right to counsel for indigent defendants in federal cases to cases brought in state courts. See *Betts v. Brady*, 316 U.S. 455, 458 (1942). The Sixth Amendment speaks clearly about the right to the assistance of counsel in criminal trials. See *supra* note 13. But see *Turner*, 131 S. Ct. at 2521 (Thomas, J., dissenting) (“[A]s originally understood, the Sixth Amendment guaranteed only the ‘right to employ counsel, or to use volunteered services of counsel’; it did not require the court to appoint counsel in any circumstance.”). In the civil context, the Fourteenth Amendment is the only constitutional provision that applies, and it does not explicitly state that there is a right to counsel. However, the argument this Article makes does not turn on the language of the two amendments. To the contrary, this Article argues for a better reading of fundamental fairness through the Due Process Clause of the Fourteenth Amendment—a reading that will take heed of how the consequence of state power (in this case prison) should be equally protected against in both the criminal and civil context.

106 See *Gideon v. Wainwright*, 372 U.S. 335, 341–42 (1963).

thus takes a fairly paternalistic view of how the state should protect indigent criminal defendants.

The Court's discussion of the right to counsel in the criminal context falls into three general categories. First, the Court is at pains to acknowledge that the state expends significant time and resources in facilitating the criminal justice system.¹⁰⁷ In order to achieve fairness, the Court argues, the state must provide the defendant with similar tools such as the right to counsel.¹⁰⁸ Second, the Court is concerned with the conviction of innocent people and with what such convictions will do to the legitimacy of the overall institution.¹⁰⁹ To that end, the Court asserts that lawyers are necessary because laypeople simply do not have the capacity to defend themselves.¹¹⁰ Finally, the Court rejects a case-by-case approach in the criminal setting because it asserts there is a danger of unfairness in all cases.¹¹¹ The inability to distinguish cases based on their complexity leads the Court to conclude that whenever a defendant's liberty is in jeopardy—no matter the length of time at stake—she should have the assistance of counsel regardless of economic status.¹¹²

Gideon provides an example of the first principle—government resources poured into convicting and incarcerating criminals require that a defendant have access to counsel. The Court reasoned that this was an “obvious truth.”¹¹³ It stated, “Governments, both state and federal, quite properly spend vast sums of money to establish machinery to try defendants accused of crime. Lawyers to prosecute are everywhere deemed essential to protect the public's interest in an orderly society.”¹¹⁴ Because the government spends so much time and money on this criminal system, the Court noted that most defendants who can afford counsel do so—and many of them hire the best counsel they can find.¹¹⁵ The fact that lawyers are generally hired by defendants and always required by the prosecution led the Court to conclude that “lawyers in criminal courts are necessities, not luxuries.”¹¹⁶ The Court explained that while other countries have decided that the right to counsel is not fundamental, our country is different because it values such “procedural and substantive safeguards designed to assure fair trials before impartial

107 *Id.* at 344 (“Governments, both state and federal, quite properly spend vast sums of money to establish machinery to try defendants accused of crime.”).

108 *Id.* at 344–45.

109 *See* *Powell v. Alabama*, 287 U.S. 45, 69 (1932).

110 *Id.* (“[A defendant] requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence.”).

111 *Gideon*, 372 U.S. at 343–45.

112 *Id.*

113 *Id.* at 344.

114 *Id.*

115 *Id.* (“Similarly, there are few defendants charged with crime, few indeed, who fail to hire the best lawyers they can get to prepare and present their defenses.”).

116 *Id.*

tribunals in which every defendant stands equal before the law.”¹¹⁷ To that end, the Court concluded that this “noble ideal cannot be realized if the poor man charged with crime has to face his accusers without a lawyer to assist him.”¹¹⁸

The second factor—legitimacy through accuracy—is related to the need for an indigent defendant to have a lawyer in order to level the playing field. The Court in *Powell* focused on the inability of laypeople to defend themselves in a complex criminal justice system. The Court explained that “[e]ven the intelligent and educated layman has small and sometimes no skill in the science of law.”¹¹⁹ After all, a layperson is not familiar with the rules of evidence, how a trial proceeds, or even how to appeal to a jury.¹²⁰ The Court noted, “Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one.”¹²¹ The Court demonstrated deep concern for how society might view the criminal justice system if innocent people are erroneously imprisoned because of their lack of an attorney. The “guiding hand of counsel” is necessary, according to the *Powell* Court, because without it “he faces the danger of conviction because he does not know how to establish his innocence.”¹²² Finally, even worse than the intelligent layperson is the specter of the “feeble-minded” defendant who is at the mercy of the criminal justice system without an attorney. The Court explained that if a “deaf and dumb, illiterate, and feeble-minded” person were tried without counsel and sentenced to death, such a sentence “carried into execution, would be little short of judicial murder.”¹²³ Such an extreme case would certainly be viewed as a “gross violation of the guarantee of due process of law.”¹²⁴ The Court’s language demonstrates its concern for how the public views the criminal justice system, and that to improve the system’s legitimacy, indigent defendants should be provided with counsel.

The Court made a similar point in *Argersinger* when it discussed the difficulty and prominence of guilty pleas in the criminal justice system.¹²⁵ The Court asserted that individual defendants needed counsel to decide whether to take a guilty plea or not.¹²⁶ “Counsel is needed so that the accused may know precisely what he is doing, so that he is fully aware of the prospect of going to jail or prison, and so that he is treated fairly by the prosecution.”¹²⁷

117 *Id.*

118 *Id.*

119 *Powell v. Alabama*, 287 U.S. 45, 69 (1932).

120 *Id.*

121 *Id.*

122 *Id.*

123 *Id.* at 72.

124 *Id.*

125 *Argersinger v. Hamlin*, 407 U.S. 25, 34 (1972).

126 *Id.*

127 *Id.*

Once again, the Court showed concern for whether the defendant was aware of the consequences of his actions and for whether the proceedings were fair. The *Argersinger* Court similarly expressed concern that there might be a tendency to dispose of cases too quickly, and thus reach the wrong result, because courts would be so overwhelmed with cases.¹²⁸ The Court explained that “the volume of misdemeanor cases, far greater in number than felony prosecutions, may create an obsession for speedy dispositions, regardless of the fairness of the result.”¹²⁹

Finally, in *Gideon*, the Court ultimately rejected a case-by-case approach to determining the necessity of counsel in the criminal context.¹³⁰ It overturned the approach articulated in *Betts* largely because it determined that defining complexity was a futile exercise.¹³¹ In his concurring opinion, Justice Harlan wrote, “In noncapital cases, the ‘special circumstances’ rule has continued to exist in form while its substance has been substantially and steadily eroded.”¹³² He noted that the Court had only found these “special circumstances” to be lacking on a few occasions and even then by a “sharply divided” vote.¹³³ At the same time, he explained that courts had found “special circumstances” necessitating the appointment of counsel in cases where the “complexity” at issue was little more than a “routine difficulty.”¹³⁴ He concluded that the “Court has come to recognize . . . that the mere existence of a serious criminal charge constituted in itself special circumstances requiring the services of counsel at trial.”¹³⁵ In other words, according to Justice Harlan, the *Betts* rule was “no longer a reality” because courts were generally unwilling to declare that defendants would not benefit from the assistance of counsel.¹³⁶ Given that reality, *Betts* vested too much discretion in judges to make that determination when the better course was to declare a blanket rule that would lend some consistent legitimacy to all criminal proceedings.

The *Argersinger* Court made a similar point.¹³⁷ In that case, the Court explained that defendants in even “small” or “petty” cases should have the right to counsel when imprisonment is a consequence because even small cases can present the complexities that drove the Court to find the right to counsel in *Gideon*.¹³⁸ The Court wrote, “We are by no means convinced that legal and constitutional questions involved in a case that actually leads to imprisonment even for a brief period are any less complex than when a per-

128 *Id.*

129 *Id.* (footnote omitted).

130 *Gideon v. Wainwright*, 372 U.S. 335, 343–45 (1963).

131 *Id.*

132 *Id.* at 350 (Harlan, J., concurring).

133 *Id.* at 351.

134 *Id.*

135 *Id.*

136 *Id.*

137 *Argersinger v. Hamlin*, 407 U.S. 25, 33 (1972).

138 *Id.*

son can be sent off for six months or more.”¹³⁹ By taking the question of complexity away from the states and requiring counsel every time prison is possible, the Court exercises paternalistic authority over state courts.

B. *Civil Cases: Efficiency and Deference*

In contrast to the narrative of legitimacy and protection in criminal cases, the Court has other concerns in civil cases. Instead of language about the fairness of the proceeding and concern for the individual, the Court uses language about efficiency and deference to states and their judges.¹⁴⁰

Like the criminal context, the language used in the civil context falls into three broad categories. First, the Court expresses concern for how much it will cost the states to provide counsel to indigent parties.¹⁴¹ In full opposition to its approach in the criminal context—one that notes the amount of money and resources spent on prosecuting criminals¹⁴²—the Court does not discuss how much money is spent on civil justice regimes and instead focuses on how providing counsel for indigent defendants will further affect resource-strapped states.¹⁴³ Second, and related to the first point regarding cost, the Court views the lawyer’s role in civil proceedings quite differently.¹⁴⁴ Instead of the protector of the layperson who lends greater legitimacy to the system overall, the lawyer is described as the over-zealous advocate who will do nothing more than drive up the costs of the proceedings, with little institutional or individual gain. Finally, the Court embraces the case-by-case approach that it completely rejects in the criminal context.¹⁴⁵ As opposed to focusing on the complexity that civil cases can present, the Court argues that flexibility and discretion are necessities in the civil context.

The first category—concern for the cost of providing legal assistance in civil cases—is reflected in the doctrinal test used to address this issue, the *Mathews* balancing test.¹⁴⁶ That test, by its own terms, requires courts to weigh the value of the individual’s liberty interest against the cost for providing the procedural safeguard, and then to balance those interests against the risk of error if the safeguard is not put into place.¹⁴⁷ Moreover, when the Court discusses whether counsel should be appointed, the cost of providing

139 *Id.* at 33. The Court used vagrancy as an example. *Id.* (citing *Papachristou v. Jacksonville*, 405 U.S. 156 (1972)).

140 *See Mathews v. Eldridge*, 424 U.S. 319, 319 (1975).

141 *See infra* notes 146–49 and accompanying text.

142 *See supra* notes 113–14 and accompanying text.

143 *Mathews*, 424 U.S. at 335 (laying out the factors the Court considers for due process and noting that the final one is “the Government’s interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail”).

144 *See infra* notes 152–53 and accompanying text.

145 *See infra* notes 154–63 and accompanying text.

146 *Mathews*, 424 U.S. at 334–35.

147 *Id.*

such attorneys is often presumed to be prohibitive. In *Scarpelli*, the Court wrote that “the financial cost to the State—for appointed counsel, counsel for the State, a longer record, and the possibility of judicial review—will not be insubstantial.”¹⁴⁸ When making this type of claim, the Court does not quantify the cost, nor does it rely on a source that might provide such guidance.¹⁴⁹ Its assertion is entirely unsupported.

In addition, even when the cost of providing attorneys is quantifiable, it does not mean the procedural safeguard will be required. For example, in *Lassiter*, the Court admitted the cost of providing attorneys to indigent parents in parental rights termination hearings was quite low when compared with a parent’s interest in her child, but still found that the right to counsel was not constitutionally required.¹⁵⁰ The Court noted that because the State “wishes the termination decision to be made as economically as possible,” it would like to avoid the “expense of appointed counsel.”¹⁵¹ Thus, even when the expense of providing counsel to indigent individuals was presumed low, it was still ultimately viewed as a negative.

Similarly, the second factor—the utility of providing attorneys—is discussed in a discouraging tone. Instead of guiding the layperson through a complex legal proceeding, the attorney is described as adding time, complexity, and needless process to the legal action. For example, in *Scarpelli*, the Court wrote,

The introduction of counsel into a revocation proceeding will alter significantly the nature of the proceeding. If counsel is provided for the probationer or parolee, the State in turn will normally provide its own counsel; lawyers, by training and disposition, are advocates and bound by professional duty to present all available evidence and arguments in support of their clients’ positions and to contest with vigor all adverse evidence and views.¹⁵²

In other words, adding a lawyer to the indigent individual’s proceeding would have a cascade effect. The lawyer will force the state to increase its legal presence, and leave no stone unturned in his zealous quest to defend his client. This advocacy is not viewed as a systemic gain in the civil context. Quite the contrary, it is a negative, taking time and money away from an otherwise efficient and fair-enough system. The same point was made by the *Lassiter* Court, when it noted that the state would want to avoid the “cost of the lengthened proceedings” caused by the presence of an indigent’s lawyer.¹⁵³

148 Gagnon v. Scarpelli, 411 U.S. 778, 788 (1972).

149 See Laura K. Abel, Turner v. Rogers and the Right to Meaningful Access to the Courts, 90 DENV. U. L. REV. (forthcoming 2013) (discussing the Court’s reliance on intuition and not empirics in the context of civil right to counsel cases).

150 Lassiter v. Dep’t of Soc. Servs., 452 U.S. 18, 28, 33 (1981) (noting the “concession in the respondent’s brief that the ‘potential costs of appointed counsel in termination proceedings . . . is [sic] admittedly *de minimis* compared to the costs in all criminal actions”).

151 *Id.* at 28.

152 *Scarpelli*, 411 U.S. at 787.

153 See *Lassiter*, 452 U.S. at 28.

The Court's focus on the potential costs to the state and how attorneys not only add to that cost, but do not add much in the way of value, leads to the final category of language—the need for a case-by-case approach in assessing the necessity of appointed counsel. The Court rejects the application of an “inflexible constitutional rule with respect to the requirement of counsel” and opts for “the exercise of . . . sound discretion” by the individual in charge of the proceeding.¹⁵⁴ The *Scarpelli* Court explicitly refused the rationale for *Gideon*'s adoption of a blanket rule in the criminal context.¹⁵⁵ Its reasoning is important because the Court continues to rely on particular attributes of a civil proceeding to justify the denial of counsel. For example, in *Scarpelli*, the Court distinguished criminal trials from the probation revocation hearing at issue in that case.¹⁵⁶ While a criminal proceeding has a formal prosecutor, applies the rules of evidence, and includes a number of procedural protections for the defendant that might otherwise be waived, something like a revocation hearing is much more informal.¹⁵⁷ The state is represented by a parole officer, not a prosecutor, the procedures and rules are not formalized, and the hearing body in the case of probation is knowledgeable about the general issues in revocation hearings and about the specific case before it.¹⁵⁸ According to the *Scarpelli* Court, it was in the interest of “both society and the probationer” to preserve these distinctions between the criminal and civil proceedings.¹⁵⁹ Preservation of such distinctions requires decision-making bodies to have full discretion to decide on an ad hoc basis whether counsel is required in any particular case. The Court noted that while counsel would be unnecessary in most probation revocation cases, where fundamental fairness was implicated, the decision-makers could and should be trusted to provide counsel.¹⁶⁰

The Court reached a similar decision in *Lassiter*. There, the Court looked critically at the record before it and determined that even if counsel had been appointed to *Lassiter*, her parental rights would still have been terminated.¹⁶¹ The Court found parental termination hearings were subject to “infinite variation” as to the facts presented.¹⁶² That variation prevented the Court from coming up with a hard-and-fast set of rules to apply.¹⁶³ The flexibility of a case-by-case approach would allow for each decision-maker to weigh the variations before it and decide whether counsel for the indigent individual was required or not. Through this move, the Court demonstrates a high level of deference to decision-makers in the civil context.

154 *Scarpelli*, 411 U.S. at 790.

155 *Id.* at 789.

156 *Id.*

157 *Id.*

158 *Id.*

159 *Id.* at 788–89.

160 *Id.* at 790.

161 *Lassiter v. Dep't of Soc. Servs.*, 452 U.S. 18, 32–33 (1981).

162 *Id.* at 32 (quoting *Scarpelli*, 411 U.S. at 790).

163 *Id.*

C. Civil and Criminal Narratives Compared

The Court undeniably uses different narratives to describe the utility of attorneys in the criminal context versus the civil one. In the criminal context, there is an awareness of the state's power and its potential to co-opt fairness from individual citizens. This sentiment manifests in the Court's willingness to admit the full power of the prosecutorial office and criminal justice system, and further in its willingness to try to offset (if not equalize) that power by providing indigent defendants with attorneys. In contrast, in the civil context, the Court does not acknowledge the presence and power of the state in particular civil proceedings. In fact, it downplays the state and instead focuses on the costs to the state of providing attorneys.

The Court is able to engage in what is arguably an inconsistent response to similar law-driven proceedings because of how it chooses to describe the lawyer's role and its choice of a blanket rule in one setting and a case-by-case rule in the other. By creating a narrative of the lawyer as helper to layperson, the Court justifies the presence of attorneys in the criminal justice system. In the majority opinions, there is hardly a mention of the real "cost" to the states for providing such lawyers, and when there is, the discussion is rather dismissive.¹⁶⁴ However, the discussion of lawyers in the civil setting centers on what they take away from the process—lengthening the proceedings, over-zealously defending their client, and otherwise adding process without value.¹⁶⁵ These are two radically different narratives of the lawyer that cannot be chalked up to a distinction between civil and criminal practice. Certainly, it could be argued that giving criminal defendants counsel protracts the process of prosecuting and trying them. Yet, the Court does not engage that line of reasoning in its seminal opinions. Instead, it relies on the argument that a legitimate criminal justice system necessitates the presence of lawyers on both sides. By the same token, one could easily argue that individuals in the civil justice setting would benefit from the presence of a lawyer. Yet, the Court does not engage that line of thinking either and instead relies on the counter-principle that attorneys add costs and slow the process down.

The Court can maintain this distinction by engaging in a case-by-case analysis in the civil setting and by completely rejecting any such analysis in the criminal one. There is no doubt that the Court could pick a criminal case, look at the specific facts of that case, and conclude that even if a lawyer was present, the result would still be guilt.¹⁶⁶ Yet, in *Gideon*, the Court eschewed that approach. It did so to demonstrate that the criminal justice system's legitimacy was dependent on the appearance of parity between the state and the accused. As demonstrated in cases like *Scarpelli* and *Lassiter*,

164 See *Argersinger v. Hamlin*, 407 U.S. 25, 37 n.7 ("We do not share Mr. Justice Powell's doubt that the Nation's legal resources are insufficient to implement the rule we announce today."); see also *infra* Part V.A for a discussion of the cost of providing attorneys.

165 See *supra* Part II.B.

166 The Court, for example, routinely engages in this type of analysis in the habeas context.

however, the Court embraces the case-by-case approach in the civil context and uses that approach to essentially legitimize the civil justice system. By looking at those cases and arguing that an attorney could not have made a difference,¹⁶⁷ the Court attempts to demonstrate that lawyers—in these particular contexts—would not have helped and would have, in fact, harmed the overall civil justice system. The Court achieves the efficiency aims it desires and further proves its premise that the cost of providing lawyers would be prohibitive and not effective for the overall regime.

The Court's reason for using this distinctive language is that there are doctrinal distinctions to respect—criminal cases get one set of rules and civil another. Yet, the Court does not always adhere to these strict doctrinal distinctions in the criminal setting.¹⁶⁸ Its move from *Betts* to *Gideon* demonstrates that it is willing to consider the consequences when formulating doctrine in the criminal context. The inevitable question is why the Court has embraced consequences in the criminal realm, but has so steadfastly disregarded consequences in the civil one.

D. A Doctrine-Oriented Approach

This Article argues that the Court discounts consequences in civil proceedings because it takes a doctrine-oriented approach. The challenge is that the Court is not explicit about the reasoning behind its hard line. In other words, except for a doctrinally accurate assertion that a case arises in a civil proceeding versus a criminal one, it does not expand on its reasoning for finding a right to counsel in one case but not in the other.¹⁶⁹ Yet, the Court's use of particular narratives provides clues as to why the Court takes such a different approach on the issue of right to counsel when the ultimate consequence to be suffered by the party—prison—is the same.

The Court's approach to traditional private civil litigation provides the most important clue. The Court is often criticized for taking a dim view of private civil litigation, its plaintiffs, and its lawyers.¹⁷⁰ This narrative of hostile-

167 Or, in the case of *Scarpelli*, remanding that decision to the trial court. *Gagnon v. Scarpelli*, 411 U.S. 778 (1972).

168 For example, in *Padilla v. Kentucky*, 130 S. Ct. 1473 (2010), the Court applied the Sixth Amendment to a civil collateral consequence in the petitioner's ineffective assistance of counsel claim. *Id.* at 1482. In other words, the Court minimized doctrinal distinctions in the criminal context and expanded a criminal protection to envelope a civil consequence.

169 Again, this discussion goes beyond the basic distinctions between the Sixth and Fourteenth Amendments. See *supra* note 105.

170 See, e.g., Brooke D. Coleman, *Recovering Access: Rethinking the Structure of Federal Civil Rulemaking*, 39 N. MEX. L. REV. 261 (2009) [hereinafter *Recovering Access*] (arguing that the structure of the federal rulemaking bodies benefits better-resourced parties in litigation and marginalizes less-resourced parties and their lawyers); Brooke D. Coleman, *The Vanishing Plaintiff*, 42 SETON HALL L. REV. 501, 543–50 (2012) [hereinafter *The Vanishing Plaintiff*] (arguing that restrictive procedures impact marginalized individuals most profoundly); Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 EMPIRICAL LEGAL STUD. 459 (2004) (studying how trial rates have

ity toward civil litigation has led the Court to make decisions that often seem to sacrifice what is just for what is most expedient.¹⁷¹ The difference here, of course, is that the civil litigation at issue is not private litigation seeking monetary relief for past harms. Instead, this civil litigation is seeking to enforce standing court orders with the threat of incarceration. Yet, even with this stark distinction—damages versus prison—the Court is unable to divorce itself from its standard civil litigation narrative. It simply cannot, or will not, see that the consequence in these cases, and the party’s circumstances, are completely different and thus deserving of different treatment.

The Court’s civil litigation narrative is largely driven by its desire to pursue efficiency in the civil context, often at the expense of what is just and thus

declined under various procedural rule changes and shifts in the courts); Marc Galanter, *Why the “Haves” Come Out Ahead: Speculations on the Limits of Legal Change*, 9 L. & SOC’Y REV. 95 (1974) (studying how repeat players in litigation do better in civil litigation than one-time litigants); Gillian K. Hadfield, *Exploring Economic and Democratic Theories of Civil Litigation: Differences Between Individual and Organizational Litigants in the Disposition of Federal Civil Cases*, 57 STAN. L. REV. 1275, 1281 (2005) (finding that organizational parties fared better than individuals in federal civil litigation); Deseriee A. Kennedy, *Processing Civil Rights Summary Judgment and Consumer Discrimination Claims*, 53 DEPAUL L. REV. 989, 990 (2004) (“[T]he prevailing procedural standards undermine the ability of plaintiffs to pursue consumer discrimination claims.”); Arthur R. Miller, *The Pretrial Rush to Judgment: Are the “Litigation Explosion,” “Liability Crisis,” and Efficiency Clichés Eroding Our Day in Court and Jury Trial Commitments?*, 78 N.Y.U. L. REV. 982 (2003) (arguing that the Court has sacrificed just results for its pursuit of efficiency in its construction of procedural rules); Elizabeth M. Schneider, *The Dangers of Summary Judgment: Gender and Federal Civil Litigation*, 59 RUTGERS L. REV. 705, 766–67 (2007); A. Benjamin Spencer, Essay, *The Restrictive Ethos in Civil Procedure*, 78 GEO. WASH. L. REV. 353 (2010) (arguing that the Court’s restrictive approach to constructing federal rules negatively affects social out-groups); Jeffrey W. Stempel, *Contracting Access to the Courts: Myth or Reality? Boon or Bane?*, 40 ARIZ. L. REV. 965, 994 (1998) (bemoaning appellate review that is increasingly “less searching and less thorough”); Erik K. Yamamoto, *Efficiency’s Threat to the Value of Accessible Courts of Minorities*, 25 HARV. C.R.-C.L. L. REV. 341 (1990) (arguing that procedural reforms have restricted access to the courts).

171 See Elizabeth J. Cabraser, *Apportioning Due Process: Preserving the Right to Affordable Justice*, 87 DEN. U. L. REV. 437, 448–49 (2010) (arguing that the better-resourced parties get the due process they can afford, while other parties get the bare minimum); Coleman, *The Vanishing Plaintiff*, *supra* note 170, at 502–04 (arguing that the Court’s concern with efficiency has effectively driven marginalized plaintiffs and their lawyers out of the civil justice system); Kennedy, *supra* note 170, at 990 (arguing that summary judgment practice negatively impacts consumer claims by minority parties); Schneider, *supra* note 170, at 766–67 (arguing that summary judgment practice marginalizes claims made by women); Michael Selmi, *Why Are Employment Discrimination Cases So Hard to Win?*, 61 LA. L. REV. 555, 561–62 (2001) (arguing that the efficiency aims of summary judgment practice and of the substantive structure of the law make employment discrimination cases difficult to win); Stempel, *supra* note 170, at 994 (“[B]oth the 1983 Amendment and the 1993 Amendment [to Rule 11] represent increased procedural hurdles and risk for litigants, resulting in a net shrinkage of access to courts.”); Carl Tobias, *Reconsidering Rule 11*, 46 U. MIAMI L. REV. 855 (1992) (arguing the proposed 1993 version of Rule 11 would still needlessly burden plaintiffs and their attorneys); Yamamoto, *supra* note 170, at 345–49 (arguing that in the name of efficiency, minority interests have been sacrificed).

most legitimate for the overall system. This drive is motivated by a number of factors, including (1) distrust of the civil justice system; (2) adherence to federalism principles; and (3) lack of concern for or awareness of marginalized individuals. These factors appear in both traditional civil litigation opinions and in cases where the consequence of civil litigation is the loss of liberty. To put it differently, the Court's predisposition to distrust civil litigation leads it to use the same language and approach in this sub-set of civil cases where the consequence is so distinct. The point is not that the Court uniformly agrees on each of these reasons when it rejects the right to counsel in the civil setting. This Article argues that individual justices use a combination of these reasons to ultimately coalesce around an approach that denies an absolute right to counsel in civil proceedings in which an individual's liberty is at stake.¹⁷²

1. Systemic Distrust

One consistent narrative in early cases denying a right to counsel in the criminal regime and the ongoing denial of such rights in the civil context is a complete distrust of lawyers. The language the Court uses in both contexts questions what value lawyers add to a process. Words like "delay," "formalism," and "zealous" have a distinctly negative tone in these cases and demonstrate that the Court is in the very least wary of what lawyers do for the system.

In the criminal context since *Gideon*, the Court has depicted lawyers as shepherds for hapless defendants, helping them through the precarious criminal justice system stacked against them.¹⁷³ In opposition to this language, the lawyer in the civil context is often viewed as a greedy, over-zealous manipulator who has a winner-take-all (or perhaps scorched-earth) approach

172 The "new formalism" of some Justices may also play into how the Court decides this category of cases. See Thomas C. Grey, *The New Formalism* (Stanford Pub. Law & Legal Theory Working Paper Series, Paper No. 4, 1999), available at <http://ssrn.com/abstract=200732> (defining and describing the increase in legal formalism). For example, the Court's personnel changed between the *Gideon* and *Lassiter* decisions, and the Warren Court had a different ethos than the Rehnquist Court.

173 See *supra* Parts II.A, II.C; see also *Missouri v. Frye*, 132 S. Ct. 1399, 1408 (2012) (extending ineffective assistance of counsel claims to the counsel's failure to communicate pleas to clients during the plea bargaining stage noting that "as a general rule, defense counsel has the duty to communicate formal offers from the prosecution to accept a plea on terms and conditions that may be favorable to the accused"); *Laffer v. Cooper*, 132 S. Ct. 1376, 1388 (2012) (extending an ineffective assistance of counsel claim to a situation where an attorney gave bad advice at the plea bargaining stage, stating "[t]he fact that respondent is guilty does not mean he was not entitled by the Sixth Amendment to effective assistance or that he suffered no prejudice from his attorney's deficient performance during plea bargaining"); *Alabama v. Shelton*, 535 U.S. 654, 658 (2002) (holding that a "suspended sentence that may end up in the actual deprivation of a person's liberty may not be imposed unless the defendant was accorded the guiding hand of counsel in the prosecution for the crime charged" (quoting *Argersinger v. Hamlin*, 407 U.S. 25, 40 (1972)) (internal quotation marks omitted)).

to litigation.¹⁷⁴ The utility of the lawyer is a strong justification for requiring lawyers in the criminal context, lending legitimacy to the criminal justice system. Yet, how lawyers are depicted in the civil context is in polar opposition to that characterization. The civil lawyer only delays and cannot help but create additional formality and excess for the process. As opposed to the criminal lawyer as the model of legitimacy, the lawyer in the civil context is a needless distraction.

Beyond its lower regard for lawyers, the Court does not trust the rigor of the overall system itself.¹⁷⁵ Both inside and outside of the right-to-counsel context, the Court is often quick to insult lawyers and the drive for fees that ostensibly motivates them. This distrust of the system is palpable in the Court's decisions in various cases. For example, in cases addressing the pleading requirements for civil cases, the Court's rhetoric about lawyers and "abuse" of the litigation system is used to justify further curtailment of what pleadings can survive a motion to dismiss.¹⁷⁶ Similarly, this language domi-

174 See *supra* Parts II.B, II.C. Consider Justice Friendly's view of lawyers:

To be sure, counsel can often perform useful functions even in welfare cases or other instances of mass justice; they may bring out facts ignored by or unknown to the authorities, or help to work out satisfactory compromises. But this is only one side of the coin. Under our adversary system the role of counsel is not to make sure the truth is ascertained but to advance his client's cause by any ethical means. Within the limits of professional propriety, causing delay and sowing confusion not only are his right but may be his duty. The appearance of counsel for the citizen is likely to lead the government to provide one—or at least to cause the government's representative to act like one. The result may be to turn what might have been a short conference leading to an amicable result into a protracted controversy. . . .

. . . .

These problems concerning counsel and confrontation inevitably bring up the question whether we would not do better to abandon the adversary system in certain areas of mass justice

. . . . While such an experiment would be a sharp break with our tradition of adversary process, that tradition, which has come under serious general challenge from a thoughtful and distinguished judge, was not formulated for a situation in which many thousands of hearings must be provided each month.

Henry J. Friendly, *Some Kind of Hearing*, 123 U. PA. L. REV. 1267, 1287–90 (1975). This quote was cited in *Walters v. Nat'l Ass'n of Radiation Survivors*, 473 U.S. 305, 325 (1985), to support the proposition that lawyers would add too much cost to the processing of veteran's benefits.

175 See *supra* note 174; see also *infra* notes 176–78 and accompanying text.

176 See *Bell Atlantic v. Twombly*, 550 U.S. 544 (2007). In *Twombly*, the Court "retired" the more lenient "no-set-of-facts" pleading standard from *Conley v. Gibson*, 355 U.S. 41 (1957), citing as one major reason the fear of heightened discovery costs from a groundless claim. *Twombly*, 550 U.S. at 588–59. The Court wrote that a plaintiff with a "largely groundless claim" should not be allowed to "take up the time of a number of other people, with the right to do so representing an *in terrorem* increment of the settlement value." *Id.* at 558 (citations omitted) (internal quotation marks omitted). The Court, by implication, took a negative view of claims brought by many lawyers, viewing them as seizing on an opportunity to force a lucrative settlement as opposed to seeking justice. This position was

nated the discussion regarding summary judgment.¹⁷⁷ Yet, the language expressing distrust of the system is not just limited to the discussion of procedural doctrines; it crosses substantive lines. For instance, in a recent case involving the Petition Clause, the majority criticized the attorney's line of questioning in a proceeding leading up to the case, even when it had little or

solidified in *Ashcroft v. Iqbal*, 556 U.S. 662 (2009). In *Iqbal*, the Court also focused on the cost of litigation, and not the justice being sought. *Id.* at 685. It wrote, "Litigation, though necessary to ensure that officials comply with the law, exacts heavy costs in terms of efficiency and expenditure of valuable time and resources that might otherwise be directed to the proper execution of the work of the Government." *Id.*; see also Lonny S. Hoffman, *Burn Up the Chaff with Unquenchable Fire: What Two Doctrinal Intersections Can Teach Us About Judicial Power over Pleadings*, 88 B.U. L. REV. 1217, 1233 (2008) (noting that *Twombly* presents "the discovery abuse problem in one-dimensional terms. Even though defendants are equally capable of abusing discovery, and are at least as equally incentivized to do so, the Court focused only on the problem of discovery abuse by reference to the incidence of nonmeritorious litigation . . . brought by plaintiffs"); Arthur R. Miller, *From Conley to Twombly to Iqbal: A Double Play on the Federal Rules of Civil Procedure*, 60 DUKE L.J. 1, 2 (2010) (arguing these cases demonstrate that "there has been too much attention paid to claims by corporate and other defense interests of expense and possible abuse and too little on citizen access, a level litigation playing field, and the other values of civil litigation"); A. Benjamin Spencer, *Plausibility Pleading*, 49 B.C. L. REV. 431, 452–53 (2008) (observing that "the Court suggested that 'checking discovery abuse' is a goal it sought to achieve through the pleading rules as well[,] but arguing that "[t]here is no reason to suppose that plaintiffs filing complaints with factual allegations that are merely consistent with rather than suggestive of liability will resort to impositional discovery requests with greater frequency than plaintiffs who cross the threshold of plausibility").

177 See *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986) ("Summary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole . . ."). Like the pleading cases, fear of overzealous attorneys bringing frivolous cases drove the Court to strengthen the summary judgment procedure. In *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986), the Court held that something more than the creation of "some metaphysical doubt as to the material facts" was necessary to require a court to proceed to trial. *Id.* at 586. In *Matsushita*, the Court determined that plaintiffs' claim made no "economic sense" and rejected their day in court. *Id.* at 587, 598. Again, the insinuation being that the plaintiffs and their attorneys brought frivolous claims that were wasting the system's time. But see Michael J. Kaufman, *Summary Pre-Judgment: The Supreme Court's Profound, Pervasive, and Problematic Presumption About Human Behavior*, 43 LOY. U. CHI. L.J. 593, 595 (2012) (arguing judges should not presume rational human behavior when assessing claims on summary judgment and that doing so in *Matsushita* was a mistake under both the law and under prevailing economic theory); Miller, *supra* note 170, at 1071 ("Overly enthusiastic use of summary judgment means that trialworthy cases will be terminated pretrial on motion papers, possibly compromising the litigants' constitutional rights to a day in court and jury trial."); Jeffrey W. Stempel, *A Distorted Mirror: The Supreme Court's Shimmering View of Summary Judgment, Directed Verdict, and the Adjudication Process*, 49 OHIO ST. L.J. 95 (1988) (criticizing the court for its summary judgment cases); Suja Thomas, *Why Summary Judgment Is Unconstitutional*, 93 VA. L. REV. 139 (2007) (arguing that summary judgment is unconstitutional because "no procedure similar to summary judgment existed at" the ratification of the Seventh Amendment and that it "violates the core principals . . . of the English common law").

nothing to do with disposition of the merits.¹⁷⁸ In other words, even when the case is not about the attorney's performance or whether the lawyer's assistance is required, the Court will take the opportunity to speak to the lawyer's conduct and quality. By doing so, the Court shows its distrust of both lawyers and the entirety of the civil justice system.¹⁷⁹

In light of this wariness, the Court attempts to make the civil justice system more efficient. Legitimacy is not the primary focus in the civil justice context; much more prominent is the sense that the lawyers must be reined in so the overall system does not suffer and grind to a halt. The Court appears to view its role with regard to the civil justice system as one of keeping lawyers in line, lest they waste society's money and time. The lawyers, as opposed to the protectors in the criminal setting, are part of the problem in the civil one. Driven by this distinctive narrative, the Court treats the question of whether lawyers are a necessity quite differently.¹⁸⁰

2. Federalism

Another narrative common in the criminal pre-*Gideon* cases and applicable in the civil context is the Court's overall deference to states and their respective court systems. Ultimately, the state is financially responsible for implementing many of the Court's requirements, and the cost of providing counsel to indigent defendants in both civil and criminal proceedings is no small matter.¹⁸¹ This concern about how the states would pay for such ser-

178 See *Borough of Duryea v. Guarnieri*, 131 S. Ct. 2488, 2496–97 (2011) (noting that by delineating every question she asked, the majority wrote that the attorney was “invit[ing] the jury to evaluate the council’s decisions in light of an emotional appeal on behalf of Guarnieri’s ‘little dog Hercules, little white fluffy dog and half Shitsu’”). The tone of this case demonstrates the dismissive view the Court often has of lawyers in the civil context.

179 The Court's rhetoric regarding attorneys is not solely limited to its official opinions. See, e.g., Ashby Jones, *Scalia: 'We Are Devoting Too Many of Our Best Minds to' Lawyering*, WALL ST. J. L. BLOG (Oct. 1, 2009, 8:40 AM), <http://blogs.wsj.com/law/2009/10/01/scalia-we-are-devoting-too-many-of-our-best-minds-to-lawyering> (quoting Scalia as questioning why some of the best minds in our country go into the law and noting that in his opinion the quality of counsel in the United States is generally high).

180 This is not to say that the Court is not critical of criminal lawyers as well. It most certainly is, especially in the cases where the right to counsel is the issue. See *supra* note 173 and accompanying text. However, the difference is that, in the civil context, the distrust has no bounds. It is not reserved for situations where the lawyer's performance is at issue, but instead runs through the Court's treatment of many subjects and many doctrines. See, e.g., *Wainwright v. Sykes*, 433 U.S. 72, 89 (1977) (holding that a procedural bar applies in the *civil* habeas context largely out of concern that lawyers might try to avoid raising an issue on direct appeal, only to raise it on habeas—a move the Court referred to as “sandbagging”).

181 For example, in 2008, the State of Maine “spent \$12.8 million on constitutionally required counsel and \$45 million on all other judiciary expenses including salaries, facilities, and materials.” Zachary L. Heiden, *Too Low a Price: Waiver and the Right to Counsel*, 62 ME. L. REV. 487, 498 (2010). “Though the Maine Legislature budgeted \$12.1 million for indigent legal services in 2007, the actual expenditures were expected to rise to \$13.6 million for 2008, an increase of more than 11 percent.” *Id.*; see also Judy Harrison, *Maine Runs*

vices is reflective of a greater sensitivity to the federal government's authority over the states.

Again, the Court's language is telling. In *Betts*, the Court reasoned that creating a binding rule in this context would "impose" upon the states a "requirement without distinction between criminal charges of different magnitude or in respect of courts of varying jurisdiction."¹⁸² The Court deferred to the Chief Judge of the Court of Appeals of Maryland who expressed concern about state courts' ability to apply different procedures to crimes of different degree.¹⁸³ The Court quoted Chief Judge Bond as saying, "Charges of small crimes tried before justices of the peace and capital charges tried in the higher courts would equally require the appointment of counsel. Presumably it would be argued that trials in the Traffic Court would require it."¹⁸⁴

The Court's civil jurisprudence uses similar language. It is concerned with how much lawyers will cost; not just the attorney's hourly rate, but also how much the *effect* of the attorney will cost. The *Scarpelli* Court's discussion of the "financial cost to the State" as including "appointed counsel, counsel for the State, a longer record, and the possibility of judicial review" is but one example.¹⁸⁵ Beyond the attorney's fees, the Court is concerned with what the presence of the attorney does to the state's overall civil justice system. To put it differently, there is essentially a presumption that the addition of lawyers would cost the state more than it would benefit it.

This is a notable departure from the skepticism with which the Court looks at states and their courts in the criminal justice context. In *Gideon*, the Court explained the magnitude of the state's "machinery to try defendants accused of crime."¹⁸⁶ In response to that reality, the Court required counsel. Acknowledgement of the state's power, as well as the amount of resources expended in certain civil proceedings, is completely lacking in the civil context. This is not to say that criminal and civil actions are indistinct from the state's perspective. But, there are some notable similarities. For example, in *Scarpelli*, the Court failed to appreciate that the government involvement in the probation hearings was similar to the government power exerted in pure

Out of Money for Court-Appointed Attorneys, BANGOR DAILY NEWS MAINE, May 27, 2012, <http://bangordailynews.com/2012/05/27/news/state/court-appointed-attorneys-to-go-without-pay-again-in-june/> (explaining that due to budget short-falls, attorneys representing indigent individuals would not be paid during the month of June 2012). Funding for civil cases can be similarly costly. See Alan W. Houseman, *Civil Legal Aid in the United States*, CENTER FOR L. & SOC. POL'Y, (Aug. 22, 2007), available at <http://www.clasp.org/admin/site/publications/files/0373.pdf> (estimating overall funding at about \$1 billion).

182 *Betts v. Brady*, 316 U.S. 455, 473 (1942).

183 *Id.*

184 *Id.* Cabining the extension of such a right also concerned the Court because it noted that because the Fourteenth Amendment extends protection to property, requiring counsel in *Betts* might logically lead to a requirement of counsel in civil cases involving property. *Id.*

185 *Gagnon v. Scarpelli*, 411 U.S. 778, 788 (1973).

186 *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963); see also *supra* Parts I.B, II.A.

criminal hearings.¹⁸⁷ By calling the probation hearings informal and stripping them of as many adversarial trappings as it could—rules of evidence, counsel on each side, etc.—the Court downplayed the role and power of government in the hearings.¹⁸⁸ Yet, a significant amount of state resources go into probation hearings.¹⁸⁹ In contrast to the response in the criminal cases, the Court completely defers to the decision-makers' discretion—they are trustworthy and able to decide when a lawyer might be necessary for justice. Any concern about state power and how that power might affect the legitimacy of the proceeding is largely ignored.¹⁹⁰

3. Lack of Concern for or Awareness of "Other"

The flipside of the Court's distrust of lawyers and the civil justice system is the Court's disregard for particular types of individuals. Those individuals are, most concisely, marginalized. From employment discrimination claims to claims of product liability and even on to claims challenging arbitration clauses, the Court is convincingly accused of having less regard for the powerless.¹⁹¹ Whether the Court's ill regard is the consequence of active misanthropy or just an inability to be cognitive of one's subconscious biases, the Court is often viewed as hostile to the claims made by populations that are considered "other." The Court expresses its hostility by questioning the legitimacy of the claims. Ultimately, when particular people bring certain claims, the civil justice system is far less accommodating either procedurally or substantively.

187 See *Scarpelli*, 411 U.S. at 789.

188 *Id.*

189 Daniel F. Piar, *A Uniform Code of Procedure for Revoking Probation*, 31 AM. J. CRIM. L. 117 (2003) (explaining the quite adversarial nature of probation hearings in most states).

190 This Article is not asserting that states do not ever choose to exceed constitutional requirements. For example, in the termination of parental rights setting, at the time of *Lassiter*, thirty-three states and the District of Columbia required counsel to be appointed to indigent parents. *Lassiter v. Dep't of Soc. Servs.*, 452 U.S. 18, 34 (1981). Since then, the number of states requiring counsel has increased to forty-three. See Thornburg, *supra* note 94, at 542. The same is true for civil contempt. In twenty-six states, counsel is appointed to indigent civil contempt defendants by statute or pursuant to the Constitution. Transcript of Oral Argument 15, *Turner v. Rogers*, 131 S. Ct. 2507 (2011), 2011 WL 1043624, at *15 [hereinafter Oral Argument]. However, this is not all that different from the criminal context. When *Gideon* was decided, only twenty-two states required the appointment of counsel; yet, the Court still decided to require counsel as a constitutional matter. *Gideon*, 372 U.S. at 345. In the civil context, the Court is reticent to push the states to behave in any particular way, deferring to the policymakers and by extension the people of the states. In the criminal context, the Court is willing to step in and state clearly what the Constitution requires, even when there is a split among states regarding the proper procedure.

191 See Kennedy, *supra* note 170, at 990 (arguing minorities are disadvantaged in consumer discrimination claims); Schneider, *supra* note 170, at 726 (arguing employment discrimination decisions favor the employer); Jeffrey W. Stempel, *Tainted Love: An Increasingly Odd Arbitral Infatuation in Derogation of Sound and Consistent Jurisprudence*, 60 KAN. L. REV. 795 (2012) (arguing the Court's jurisprudence in arbitration cases consistently favors the powerful over the powerless).

This hostility directly bears on the Court's jurisprudence regarding right to counsel in the civil context. There, the Court's bias against particular kinds of individuals plays out because the Court denies the right to counsel to the kinds of people it is already skeptical of in the larger civil arena. For example, in any cases involving the prison population—cases like *Scarpelli* and *Vitek*—the individuals are disproportionately poor and often people of color.¹⁹² The same is true in parental termination hearings like the one at issue in *Lassiter*.¹⁹³ These are the same individuals who are similarly marginalized in their private civil claims.¹⁹⁴

This is not to say that the Court embraces accused criminals to any greater degree. Many scholars view the overall state of criminal justice jurisprudence as dismal at best.¹⁹⁵ But, at least with respect to the right to counsel, the Court treats those individuals equally. Regardless of the person's race, ethnicity, or class, the Court has reinforced each individual's right to counsel in the criminal context. In contrast, the Court expands its hostility against private plaintiffs in the civil justice system to similarly situated individuals whose liberty is at stake in civil proceedings. This is because the Court's rejection of particular claimants in civil cases is used to justify its narrative of maintaining an efficient system.

III. *TURNER V. ROGERS*

The issue of whether indigent individuals facing incarceration should have a right to counsel in civil cases was recently presented to the Supreme Court in *Turner v. Rogers*.¹⁹⁶ The case asked whether an indigent father who

192 Brief for Elizabeth G. Patterson and South Carolina Appleseed Legal Justice Center as Amici Curiae Supporting Petitioner at 7, *Turner v. Rogers*, 131 S. Ct. 2507 (2011) (No. 10–10), available at http://www.americanbar.org/content/dam/aba/publishing/preview/publiced_preview_briefs_pdfs_2010_2011_10_10_PetitionerAmCuEPattersonandtheSCAppleseed.authcheckdam.pdf [hereinafter Patterson Brief]. Patterson found in a study that “[a]pproximately 67% of the noncustodial parent-debtors observed during these proceedings were black, 30% were white, and the remaining 3% were of another or unspecified race.” *Id.* The study also found that a “large proportion of the parents held in contempt were indigent.” *Id.* at 8. Another study found that between January 2000 and August 2003, of the 2899 individuals incarcerated in Dane County (Madison, Wisconsin) for failure to pay child support, 48% were African American while 50% were white. Brief for Center for Family Policy and Practice as Amicus Curiae Supporting Petitioner at 22, *Turner v. Rogers*, 131 S. Ct. 2507 (2011) (No. 10–10), available at http://www.americanbar.org/content/dam/aba/publishing/preview/publiced_preview_briefs_pdfs_2010_2011_10_10_PetitionerAmCuCtrforFamilyPolicyandPractice.authcheckdam.pdf [hereinafter Family Policy and Practice Brief]. Yet, the overall African American population in the county was only 4%. *Id.* at 23.

193 See Thornburg, *supra* note 94, at 539 (noting arguments about racial bias in parental termination hearings were ignored by the Court).

194 See generally Coleman, *supra* note 170.

195 See Abel, *supra* note 45, 550–54 (examining failures in the criminal justice system to argue that the civil justice system can better handle the same challenges); Barton, *supra* note 46, at 1259–62 (criticizing the criminal justice system's use of public defenders).

196 *Turner v. Rogers*, 131 S. Ct. 2507 (2011).

had failed to make his child support payments in violation of a court order had a right to counsel in a contempt hearing—a hearing that resulted in his incarceration.¹⁹⁷ In *Turner*, the Court could have dispensed with its doctrine-oriented approach, and found a right to counsel for all indigent individuals facing prison, but it did not. This Part will discuss the distinctions between civil and criminal contempt, the background of civil contempt in the child support context, the basic facts of *Turner*'s case, and the Court's ultimate decision in *Turner*.

A. *Civil vs. Criminal Contempt*

The distinctions between the law on assistance of counsel in the criminal and civil context are especially pronounced in contempt. This is because the line between criminal and civil contempt is often quite fuzzy.¹⁹⁸ In simple terms, courts can use criminal contempt to punish behavior. It is a punitive power courts have to make sure that their authority is not flouted. In other words, the power is for the benefit of the court.¹⁹⁹ In contrast, civil contempt is remedial, not punitive, and it is for the benefit of the complainant, not the court.²⁰⁰ This has led to the assertion that a civil contemnor holds the “keys to their own prison door.”²⁰¹ Because the court is only compelling the contemnor to do something that is arguably within his power, civil contempt is not viewed as punishment. After all, one just complies with the court's order, and the contempt is over.

This key distinction between the two modes of contempt has led to each developing different procedures and consequences. Most of the rights associated with a criminal prosecution apply to criminal contempt.²⁰² This includes the right to an attorney and the right to an immediate appeal.²⁰³ This is not true for civil contempt. The Court has refused to expand the rights that attach to criminal proceedings into civil contempt.²⁰⁴ As this Article discusses, there is no right to an attorney. But, there is also no right to an immediate appeal, no right to a jury, and no right to anything beyond a summary hearing.²⁰⁵

197 *Id.* at 2512.

198 *Gompers v. Bucks Stove & Range Co.*, 221 U.S. 418, 441 (1911) (“Contempts are neither wholly civil nor altogether criminal.”).

199 RONALD L. GOLDFARB, *THE CONTEMPT POWER* 56 (1963).

200 *Id.*; see also *Gompers*, 221 U.S. at 441 (“It is not the fact of punishment but rather its character and purpose that often serve to distinguish between the two classes of cases. If it is for civil contempt the punishment is remedial, and for the benefit of the complainant. But if it is for criminal contempt the sentence is punitive, to vindicate the authority of the court.”).

201 GOLDFARB, *supra* note 199, at 59.

202 Jessica Kornberg, *Rethinking Civil Contempt Incarceration*, 44 CRIM. LAW BULLETIN 70, 76 (2008) (citing FED. R. CRIM. P. 18).

203 *Id.*

204 *Id.*

205 *Id.* One possible solution would be to argue that civil contempt should be re-labeled as criminal contempt. See Earl C. Dudley, Jr., *Getting Beyond the Civil/Criminal Dis-*

One might be assuaged that the procedural differences are justified because, in the civil context, the contemnor is not punished. Yet, in addition to monetary sanctions, courts often imprison contemnors until they comply with the court order. As explained in the next Section, civil contempt orders in the child support payment context are a good example of how civil contempt can work. If the parent-debtor misses a payment, he is held in contempt and imprisoned. If the parent-debtor pays the outstanding debt, he is freed, but if he does not, he remains in prison.²⁰⁶

B. State Involvement in Enforcement of Child Support Orders

In order to understand the issues involved in *Turner*, it is important to know how the state becomes involved in child support payment collection. What follows is a brief summary of that system.²⁰⁷

tion: A New Approach to the Regulation of Indirect Contempts, 79 VA. L. REV. 1025, 1073–74 (1993) (arguing courts should use *Mathews* due process analysis when assessing whether any criminal procedural safeguards apply in the civil contempt context); Kornberg, *supra* note 202, at 82 (arguing for “subject-sensitive treatment” of civil contempt, meaning that the court should look at the purpose of the contempt to decide whether criminal rights such as right to counsel should apply). Yet, there are reasons for maintaining a distinction between the two. Primarily, courts need flexibility to do run-of-the-mill contempt proceedings, especially when the state is not arguably in an adversarial position vis-à-vis the contemnor. See *Int’l Union, United Mine Workers v. Bagwell*, 512 U.S. 821, 833–34 (1994) (“Contempts such as failure to comply with document discovery, for example, while occurring outside the court’s presence, impede the court’s ability to adjudicate the proceedings before it and thus touch upon the core justification for the contempt power.”). One study determined that the “average contemnor spends less than two weeks in jail before complying.” Kornberg, *supra* note 202, at 72 & n.5. This means that in many cases, the consequence is less severe and perhaps attributable to the traditional use of civil contempt incarceration—one intended to get a witness to testify or to get an attorney to produce a court-ordered document. Moreover, these “traditional” situations are ones where the contemnor is likely to have counsel. Finally, the valid academic argument for merging the two made by scholars like Dudley has been rejected by the Court. There is some appeal to Dudley’s argument, and it would apply to all criminal procedural safeguards. Dudley, *supra*, at 1073–74. For right to counsel, he argued that due process “should require the appointment of counsel for indigent accused contemnors, at least in all cases where the sanction reaches a certain level of severity.” *Id.* at 1085. He noted that “several federal courts of appeals have already so held[,]” yet with *Turner*, the Supreme Court effectively rejected the approach taken by those courts and argued for by Dudley. *Id.* Finally, Dudley’s argument for legislative reform also looks to be doomed, as Congress has done little with respect to civil contempt procedures. *Id.* at 1096–97.

206 In lieu of holding the parent-debtor in civil contempt under the regime explained in Part III.B, the state could instead refer his case to a prosecutor, making it a criminal contempt with the key factual question being whether he could pay or not. The factual question would be the same in both cases, but in criminal contempt, he would have appointed counsel while in civil contempt he would not.

207 For a detailed explanation of the history of child support and the federal government’s involvement in its collection, see Daniel Hatcher, *Child Support Harming Children: Subordinating the Best Interests of Children to the Fiscal Interests of the State*, 42 WAKE FOREST L. REV. 1029 (2007).

States are critical players in the collection of child support payments not just because of their social welfare concerns regarding their citizens. Their primary motivation was and continues to be receiving federal funding for their social welfare programs. Under both Temporary Assistance for Needy Families ("TANF") and its precursor, Aid to Families with Dependent Children, Congress requires states receiving federal funds to set up a system for child support enforcement.²⁰⁸

More specifically, under Title IV-D, adopted by Congress in 1975, Congress required states to adopt a plan for collection of child support and to have that plan approved by the Secretary of Health and Human Services.²⁰⁹ Each state, through its plan, is required to set up a system to track down non-custodial parents, establish paternity, and collect child support where the children are receiving TANF benefits.²¹⁰ Benefit recipients are required to participate in these enforcement efforts and must assign the rights to any funds that might be collected to the state or federal government.²¹¹ Collected funds are generally used to reimburse the state or the federal government for the assistance it had already provided to that family under TANF.²¹² Moreover, once the state is assigned the right to the funds, it is empowered to use all applicable state processes to collect those funds, including wage garnishment, state income tax intercepts, expedited processes for obtaining and expediting support orders, criminal prosecution, and contempt.²¹³

208 Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105 (1996); Social Security Act Amendments of 1950, c. 809, § 321(b), Pub. L. No. 81-734, 64 Stat. 550 (1951). Various legislative acts required states to establish "organizational unit[s]" that would establish paternity and collect child support by "entering into cooperative arrangements with appropriate courts and law enforcement officials." Social Security Amendments of 1967, Pub. L. No. 90-248, § 201(a)(1), 81 Stat. 877, 879 (1968).

209 42 U.S.C. § 651 (1976); 1975 Act § 101(c)(5)(C), 88 Stat. 2360.

210 42 USC § 654(4). For the purpose of this section, the Article will refer to all benefits as TANF benefits, even though much of the legislation creating the requirements arose under the AFDC system.

211 42 USC §§ 602(a)(26), 657(b).

212 42 U.S.C. § 657(b). These reimbursements costs can really add up. A noncustodial parent may find that his order of payment includes Medicaid childbirth costs, the costs of the aid already provided to the family, and/or the fees associated with a paternity test. See Family Policy and Practice Brief, *supra* note 192, at 13. In 2005, Congress adopted the Deficit Reduction Act of 2005, which gives states additional options for providing more of the child support payments recovered to the children, as opposed to the state itself. Pub. L. No. 109-171, 120 Stat. 4 (2006). However, this part of the legislation had an effective date of 2008, so it is not yet clear how many states have responded to this legislation.

213 42 U.S.C. §§ 656(a)(1), 666(a)(1)-(8), (b) (2006). There was a great incentive for states to invest in mechanisms to implement these collection efforts. While the federal government was set to reimburse up to sixty-six percent of the expenditures necessary to effect this legislation, it also offered to match up to ninety percent of any optional state expenditures for automating its monitoring and record-keeping systems. 42 U.S.C. § 654(16) (2006). The system can also be used by individuals who are not receiving entitlement payments. When collecting non-welfare payments, the system is becoming more effective, increasing from \$17.2 billion in 2002 to \$21.8 billion in 2006. Hatcher, *supra*

However, Congress has never authorized funding for the incarceration of delinquent individuals, nor has it provided funding for counsel for indigent defendants who are subject to hearings in order to enforce the support payments.²¹⁴ That cost, if any, falls completely to the state. Thus, the incentive for a state to enforce the payment of child support for its citizens receiving aid is quite high. Yet, its incentive for providing counsel within the context of an enforcement proceeding is lower.²¹⁵

In South Carolina, pursuant to all of these federal laws and regulations, the state adopted Family Court Rule 24. Because it receives federal funding for its administration of the TANF program, the state tracks the child support payments made by non-custodial parents of TANF children.²¹⁶ Under Rule 24, the clerk of the court has the authority to track these accounts, and if she sees an account in arrears, she issues a rule to show cause.²¹⁷ The rule to show cause sets a hearing date before a judge and directs the parent-debtor to appear at that hearing.²¹⁸ If the parent-debtor pays, the hearing is cancelled. However, if the parent-debtor does not pay, a hearing is held to determine why and what to do next.²¹⁹

Under state law, the court has the authority to hold the parent-debtor in contempt for what it considers to be a willful violation of the child support order.²²⁰ The rule to show cause is considered *prima facie* evidence that the debtor-parent has failed to pay child support in accordance with the terms of the court's order.²²¹ In other words, it is evidence of the parent-debtor's willful failure to pay. Thus, in these hearings, the debtor-parent has the bur-

note 207, at 1066. The collection amounts for welfare-payments decreased from \$2.9 billion to \$2.1 billion. *Id.* This difference has led one commentator to note:

While not the initial aim of the IV-D program, the impressive increase in child support collections for CSE non-TANF families provides a significant benefit to the families and to society. But the other side of child support enforcement—that which continues in the realm of welfare cost recovery efforts—is a different story.

Id.

214 See, e.g., S. REP. 98-387 (1984).

215 This does not mean that states do not provide counsel to indigent defendants in the contempt context, however. Before *Turner*, at least fifteen states required counsel as a constitutional matter and an additional eleven states required counsel through statutes or other regulation. Oral Argument, *supra* note 190, at 38–39. Seventeen of the remaining states have affirmatively rejected a right to counsel, and the remaining seven are not clear. *Id.* at 39.

216 See *supra* notes 210–12 and accompanying text.

217 Patterson Brief, *supra* note 192, at 13 (citing South Carolina Family Court Rule 24).

218 *Id.* The “rule to show cause” under Rule 24 is considered to have the same force and effect as a judge’s order issued directly from the court.

219 If the debtor-parent does not show up, the court may issue a warrant for his arrest. S.C. CODE ANN. § 63-17-390 (2010).

220 Patterson Brief, *supra* note 192, at 14 (citing Spartanburg Cnty. Dep’t of Soc. Servs. v. Padgett, 370 S.E.2d 872, 874 (S.C. 1988)).

221 *Id.* at 14.

den of establishing the failure to pay was not willful.²²² This is a highly factual determination, and the parent-debtor is expected to explain in writing and/or bring evidence of his inability to pay. The parent-debtor must convince the court that he is unable to pay and that the inability to pay is involuntary.²²³ This can be shown through evidence of dismissal from a previous job, evidence of efforts to find additional employments, statistics of unemployment rates in the area, and evidence of barriers to employment such as lack of education, mental illness, or physical injury.²²⁴

C. Turner's Failure to Pay Child Support Results in Prison

Michael Turner and Rebecca Price gave birth to a baby, referred to as B.L.P., a minor child, sometime in 1996.²²⁵ The state of their relationship after the birth of their child is unclear, but it does not appear that they were together for long because Turner married another woman, Jennie Turner, in 1999.²²⁶ Sometime in 2003, Rebecca Price sought financial assistance from the South Carolina Department of Social Services (DSS) through the federal TANF program.²²⁷ As part of the program, Price was required to aid the state in determining the paternity of her child, B.L.P.²²⁸ She did so, and the state determined Turner was B.L.P.'s biological father.²²⁹ Following that determination, the Oconee County Family Court entered an "Order of Financial Responsibility," which required Turner to pay child support payments to Price in the amount of \$51.73 per week.²³⁰

From 2003 to 2005, Turner periodically paid his child support obligations, but he did have some interactions with DSS and family court.²³¹ During that two-year period, he received four rules to show cause.²³² He appeared at those hearings and was sometimes held in civil contempt and jailed for brief periods of time.²³³ The judge also ordered his wages garnished, and in some cases, the payments were made on Turner's behalf by someone else.²³⁴

²²² *Id.*

²²³ *Id.* at 16–17.

²²⁴ *Id.* at 17.

²²⁵ Brief for Petitioner at 8, *Turner v. Rogers*, 131 S. Ct. 2507 (2011) (No. 10-10), 2011 WL 49898, at *8 [hereinafter *Petitioner's Brief*].

²²⁶ *Id.* at 9. He went on to father three more children with Jennie. *Id.*

²²⁷ *Id.* at 8.

²²⁸ See *Petitioner's Brief*, *supra* note 225, at 8; *supra* Part III.B.

²²⁹ *Petitioner's Brief*, *supra* note 225, at 8.

²³⁰ *Id.* This amount was made based on the court's determination that Turner's income was \$1386 per month. *Id.* While Turner asserted that he was unemployed, the court determined his "imputed" income pursuant to a DSS standardized formula. *Id.* at 8 n.5.

²³¹ *Id.* at 9.

²³² *Id.*

²³³ *Id.*

²³⁴ *Id.*

During this period, in 2004, Rebecca Price terminated her public-assistance payments.²³⁵ So although any payments Turner made were forwarded to DSS in the beginning, after 2004, they were forwarded directly to Rebecca Price.²³⁶ This did not mean, however, that the state stopped enforcing the order. Quite the contrary, the case continued to be handled as a “Title IV-D” case.²³⁷ This meant that DSS continued to automatically monitor Turner’s payments, and it continued to issue rules to show cause whenever Turner was in arrears.

In 2005, the state did just that. Turner did not appear for a prior hearing, so when he showed up for a later hearing in September 2005, the judge held him in contempt and sentenced him to six months in prison.²³⁸ Turner was unable to pay the support obligations and served the entire six month sentence.²³⁹ When he was released in January 2006, he owed more than \$1900.²⁴⁰ Two months later, another rule to show cause was issued against Turner, and the court determined his wages should be withheld.²⁴¹ When he continued to miss payments, the court issued a bench warrant for his arrest.²⁴² He was arrested in December 2007. By that time, Turner owed almost \$6000.²⁴³ At the January 2008 hearing regarding this amount, Turner was once again unrepresented. The judge asked him if he had anything to say, and he responded with the following,

Well, when I first got out [of jail in 2006], I got back on dope. I done meth, smoked pot and everything else, and I paid a little bit here and there. And, when I finally did get to working, I broke my back, back in September [2007]. I filed for disability and [Social Security]. And, I didn’t get straightened out off the dope until I broke my back and laid up for two months. And, now I’m off the dope and everything. I just hope that you give me a chance. I don’t know what else to say. I mean, I know I done wrong, and I should have been paying and helping her, and I’m sorry. I mean, dope had a hold [on] me.²⁴⁴

The judge did not make any findings of fact, and did not respond to Turner’s statement at all. He sentenced Turner to twelve months in prison,

235 *Id.* at 9 n.6.

236 *Id.* In 2009, B.L.P. was placed in Rebecca Price’s mother’s custody (Judy Price). *Id.* In 2010, Judy Price passed away, and B.L.P. was placed in Judy’s husband’s custody (Larry E. Price, Sr.). *Id.* Rebecca Price no longer has custody of her child, and like Turner, she now has child support obligations that she must pay in the name of B.L.P. *Id.*

237 *Id.*

238 *Id.* at 10.

239 *Id.*

240 *Id.*

241 *Id.* Some of the amount owed had diminished because DSS recovered money from some his federal and state tax refunds, as well as from other benefits payments he was receiving. *Id.*

242 *Id.*

243 *Id.* at 11.

244 *Id.*

unless Turner paid the full \$6000 he owed.²⁴⁵ Turner began serving that time, but his case was taken up on appeal on the grounds that the failure to appoint counsel during the civil contempt hearing violated Turner's due process rights.²⁴⁶ Denied relief in the state appellate and supreme courts, Turner's case was appealed to the Supreme Court.²⁴⁷ For the appellate process, Turner obtained pro bono counsel. At the time of filing his petition before the Supreme Court, Turner was still in arrears for \$13,814.72, and had another contempt hearing scheduled for May 4, 2011.²⁴⁸

D. *Supreme Court Decision in Turner*

When Turner's case reached the Supreme Court, the main issue was whether the Fourteenth Amendment required the appointment of counsel to indigent individuals facing imprisonment in civil contempt proceedings.²⁴⁹ The decision in *Turner* was five-to-four.²⁵⁰ The majority rejected the argument that whenever an indigent person was faced with the possibility of incarceration, there should be a presumption of the appointment of legal counsel.²⁵¹ It attached a "caveat" to this finding requiring that the State provide sufficient procedural safeguards to ensure the determination of the parent's ability to pay is fair.²⁵² In rejecting the right to counsel, the Court noted Sixth Amendment protections, such as right to counsel, do not apply to civil contempt proceedings like the one in Turner's case.²⁵³ Moreover, the Court stated that because the civil contemnor "'carr[ies] the keys of [his] prison in [his] own pockets,'" the Fourteenth Amendment's Due Process Clause allows for a State to have "fewer procedural protections than in a criminal case."²⁵⁴

First, the Court rejected the argument that a potential loss of physical liberty required counsel. The Court distinguished *Gault* and *Vitek* because the proceeding in *Gault* was quasi-criminal and the five justices in *Vitek* did not agree that there was a right to counsel in that case.²⁵⁵ Further, the Court distinguished *Lassiter*; namely the on-point language in that opinion stating that "'an indigent's right to appointed counsel is that such a right has been recognized to exist only where the litigant may lose his physical liberty if he

245 *Id.* at 12.

246 *Id.*

247 *Turner v. Rogers*, 131 S. Ct. 2507, 2514 (2011).

248 *Id.* at 2515.

249 *Id.* at 2512.

250 *Id.*

251 *Id.* at 2517.

252 *Id.* at 2512. The Court also addressed the question of whether Turner's case was moot because by the time the case was heard, he had been released. *Id.* at 2514. The Court rejected the argument that the case was moot because Turner's case was most certainly capable of repetition, yet because of the short terms of his prison sentences, might otherwise evade review. *Id.* at 2514–15.

253 *Id.* at 2516.

254 *Id.* (quoting *Hicks v. Feiock*, 485 U.S. 624, 633 (1988)).

255 *Id.* at 2517; see *supra* Part I.B (discussing *Gault* and *Vitek*).

loses the litigation.’”²⁵⁶ Looking back at the *Lassiter* opinion, the Court reasoned that this language was meant to point out that the right to counsel had only been found in the context of a loss of physical liberty.²⁵⁷ It was not meant as a positive statement of the premise going forward in every situation where liberty was at stake.²⁵⁸

Next, the Court applied the balancing test established in *Mathews*.²⁵⁹ While it conceded that a person’s interest in his own personal liberty was “‘at the core of the liberty protected by the Due Process Clause,’”²⁶⁰ the Court mainly discussed the risk of erroneous deprivation of the debtor-parent’s interest with and without additional procedural safeguards.²⁶¹ The Court focused on three main points.²⁶² First, the Court explained that in most cases, the issue was “the defendant’s ability to pay.”²⁶³ The Court stated that this inquiry was often a simple one.²⁶⁴ It reasoned that the question of whether the defendant could pay was directly related to the question of indigence, and in the criminal context, defendants are required to show indigence on their own before being appointed counsel.²⁶⁵ Thus, according to the Court, if criminal defendants are asked to make this kind of showing without counsel, then certainly civil defendants could make the same showing on their own at a contempt hearing.²⁶⁶ Indeed, even during oral argument, the Court questioned whether demonstrating indigence was such a difficult task. Justice Sotomayor asked Turner’s counsel, “What can a lawyer do when someone comes in and says, I’m not earning any money, I can’t earn it, blah, blah, blah, end of story?”²⁶⁷ In other words, the Court did not see any real complexity or difficulty involved in showing that one was indigent and wondered how a lawyer might aid in that inquiry.

The second concern articulated by the Court was about the unrepresented parent on the opposing side of the action to collect support payments.²⁶⁸ The Court noted that in many of these cases, the state is not in opposition to the defendant, the unrepresented custodial parent is.²⁶⁹ If the state provided counsel to the defendant, the Court worried that it might slow the process down because of the “formality [and] delay” that a lawyer would

256 *Turner*, 131 S. Ct. at 2516 (quoting *Lassiter v. Dep’t of Soc. Servs.*, 452 U.S. 18, 25 (1980)).

257 *Id.* at 2517–18.

258 *Id.*

259 *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

260 *Turner*, 131 S. Ct. at 2518 (quoting *Foucha v. Louisiana*, 504 U.S. 71, 80 (1992)).

261 *Id.* at 2518–20.

262 *Id.*

263 *Id.* at 2518–19.

264 *Id.* at 2519.

265 *Id.*

266 *Id.*

267 Oral Argument, *supra* note 190, at *10.

268 *Turner*, 131 S. Ct. at 2519.

269 *Id.*

cause.²⁷⁰ It would also make the entire proceeding less fair because with an unrepresented custodial parent pitted against a represented non-custodial parent, the court might reach an erroneous decision and deprive a child “of the support it is entitled to receive.”²⁷¹

Finally, the Court reasoned that fairness would be served by certain “substitute procedural safeguards.”²⁷² These safeguards would lower the chance of wrongfully depriving the defendant of his liberty while also maintaining fairness in the process with respect to the custodial parent and her interests.²⁷³ Such safeguards included the use of a form to solicit information about the defendant’s ability to pay, notice to the defendant that this would be a major issue in his hearing, an ability for the defendant to respond to arguments about his ability to pay, and “an express finding by the court that the defendant has the ability to pay.”²⁷⁴ These or similar safeguards, the Court opined, would “significantly reduce the risk of an erroneous deprivation of liberty” but would not “incur[] some of the drawbacks inherent in recognizing an automatic right to counsel.”²⁷⁵ Because Turner had not received any of these procedural safeguards, the Court remanded the case back to the South Carolina Supreme Court.²⁷⁶

270 *Id.*

271 *Id.*

272 *Id.* (quoting *Mathews v. Eldridge*, 424 U.S. 319, 355 (1976)) (internal quotation marks omitted).

273 *Id.*

274 *Id.* These were all suggestions made by the Solicitor General, who argued during this case. The position of the Solicitor General was that Turner did not receive due process, but that did not mean counsel was required in every civil contempt hearing. Oral Argument, *supra* note 190, at *25–*26. To the contrary, the Solicitor General suggested these substitute procedural safeguards would meet the requirements of due process. *Id.* at *26.

275 *Turner*, 131 S. Ct. at 2519. The Court also limited its opinion to situations where the opposing custodial parent was not represented by counsel; it did not speak to what its decision would be if the State were directly bringing the action. *Id.* at 2520. It indicated that it might find a right to counsel in that situation because it “resemble[d] [a] debt-collection proceeding[].” *Id.* (citing *Johnson v. Zerbst*, 304 U.S. 458, 462–63 (1938)). For more on *Zerbst*, an early right to counsel decision in the federal courts, see *supra* note 14. The *Turner* Court also did not address its decision for what it referred to as “an unusually complex case where a defendant can fairly be represented only by a trained advocate.” *Turner*, 131 S. Ct. at 2520 (internal quotation marks omitted).

276 *Turner*, 131 S. Ct. at 2520. Justice Thomas, writing for the dissent, rejected the majority’s finding that additional procedural safeguards were necessary and also questioned the right to appointed counsel in the criminal context. *Id.* at 2520–21 (Thomas, J., dissenting). Thomas first noted that the right to counsel in criminal prosecutions has been read to arise from the Sixth Amendment, which does not apply to civil contempt proceedings because, well, they are civil. *Id.* at 2521, 2523. He also questioned the right to counsel in criminal proceedings, noting that, “as originally understood, the Sixth Amendment guaranteed only the ‘right to employ counsel, or to use volunteered services of counsel’; it did not require the court to appoint counsel in any circumstance.” *Id.* at 2521 (quoting *Padilla v. Kentucky*, 130 S. Ct. 1473, 1495 (2010)). Beyond that, Thomas also rejected the majority’s fashioning of “substitute procedural safeguards” because he did not believe that

IV. A CONSEQUENCE-DRIVEN APPROACH

In *Turner*, the Court took a doctrine-oriented approach when it rejected a civil indigent individual's right to counsel in proceedings where prison was the ultimate consequence. In lieu of a doctrine-oriented approach, this Article argues for an approach that is consequence-driven.²⁷⁷ The narratives underlying the Court's adoption of a blanket rule regarding right to counsel in the criminal context apply with equal force in the civil one. In civil proceedings like the one in *Turner*, lawyers are a necessary part of the justice process. This is because the same concerns that motivated the Court to find a right to counsel in the criminal context exist in the civil one. First, the power and resources used by the state to pursue the individual in a civil contempt hearing can be immense, and a lawyer is necessary to even marginally equalize the playing field. Second, individuals do not have the capacity to appropriately defend themselves in these actions, and the judge is not capable of deciding cases while appropriately protecting the individuals' interests. Finally, all cases involving this potential for incarceration are complex, so a blanket rule, and not a case-by-case approach, should be adopted.

Using *Turner* as an example, this Article shows that if the Court eschews a doctrine-oriented approach and embraces an approach concerned with the consequences, it would have found that *Turner* had a right to an attorney. Next, this Article offers a doctrinal path for the Court in finding a right to counsel in a case like *Turner*. It can either find the right as a presumptive matter whenever an individual's liberty is at stake or it can use *Mathews* to find the right in most cases involving incarceration as a consequence.

A. State Power Is Comparable to That in Criminal Proceedings

In a civil contempt hearing, like the one in *Turner*, the government's presence is notable. Because of federal incentives and requirements, the state agencies monitor support payments religiously.²⁷⁸ When those payments are not made, there is a government-run system in place to call the offending parent before the court. The *Turner* Court distinguished *Turner*'s case from other contemnor cases where the government agency was attempt-

issue was properly before the Court and, even if it were, the safeguards were not appropriate in this context. *Id.* at 2424–25. Thomas pointed out the power differential created between a custodial mother without counsel seeking her child support payments and the non-custodial debtor-parent who, in the civil contempt moment, might now receive counsel. *Id.* at 2525–26. Finally, he argued that when fathers do not pay child support, the children suffer, and that because contempt proceedings have resulted in the increased collection of such payments, it is a valid policy decision for states and government officials to make. *Id.* at 2526.

277 This approach does not explicitly rely on consequentialism as a theoretical or jurisprudential value, but it certainly relies on its underlying logic. See generally L.W. SUMNER, WELFARE, HAPPINESS, AND ETHICS (1996) (describing and discussing various forms of consequentialist thought).

278 See *supra* Part III.B.

ing to recover funds it was directly owed.²⁷⁹ The implication of the Court's distinction is that it might view the latter case differently because there, the power of the state agency and the attendant need for lawyers is more pronounced.

While it is notable that the Court might be more concerned when the state is collecting on its debts directly from the parent-debtor, the distinction made by the Court is a false one. Without the government mechanisms in place, many custodial parents would not otherwise follow through in seeking payments from their non-paying spouses through contempt hearings. The system makes it simple for custodial parents to seek the payments and to ask for the parent-debtor to be held in contempt if such payments are not forthcoming. This is not necessarily a bad use of the government's resources, but for the Court to act as if there is no state action simply because the custodial parent is the named complainant, as opposed to the state, ignores the reality of the situation. For example, Rule 24 in South Carolina requires the clerk of the family court to automatically issue a rule to show cause against a parent-debtor whenever the child support account is in arrears.²⁸⁰ A computer system tracks these accounts and payments, and thus the process of issuing the show-cause order and requiring the parent's appearance is completely in the hands of a government agency.

In addition, a representative of the agency responsible for collecting the payment is present at the contempt hearing alongside the parent seeking payment. That representative has access to all sorts of materials at issue in the case, while the parent-debtor has no comparable access. In many cases, a lawyer for the agency will also attend these hearings. In a study conducted in South Carolina, court observers noted that "[i]n all observed hearings, an attorney for [the Department of Social Services] was present, usually sitting at opposing counsel's table. The DSS attorney often was assisted by a DSS staff member with computer access to information in the agency's database."²⁸¹ These attorneys are not passive observers, but are instead active participants in the contempt proceedings.²⁸² Moreover, where a parent-debtor can afford a lawyer, presumably he would hire one.²⁸³ The degree of government power is strikingly similar to the *Gideon* Court's discussion of prosecutorial power in criminal actions, as is the Court's observation that where criminal defendants can afford lawyers, they hire the best. This leads to the argument that lawyers are not luxuries in this context, but necessities.²⁸⁴

279 *Turner*, 131 S. Ct. at 2520.

280 Patterson Brief, *supra* note 192, at 13–14.

281 *Id.* at 14.

282 *Id.* at 15. The study also noted that "[e]ven when [the] DSS attorneys did not lead the questioning, however, these agency lawyers often participated in the proceedings." *Id.*

283 While the parent-debtor can be a mother or a father, for ease, this Article will refer to the parent-debtor as "he" and to the custodial parent as "she."

284 See *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963) ("[L]awyers in criminal courts are necessities, not luxuries.").

Another aspect of *Turner* worth noting is with regard to the custodial parent in that case. In both the majority and dissent, the Court was very concerned about the impact on the unrepresented custodial parent if an attorney was provided to the indigent parent-debtor.²⁸⁵ This is a legitimate concern, but one that should be minimized for a couple of reasons. First, the custodial parent is often not the direct beneficiary of the contempt process. In many cases, any money collected is paid directly back to the government as reimbursement for entitlement payments already received by the custodial parent.²⁸⁶ Second, even when the parent is the recipient of the funds, if paid, he or she is not a necessary element of the hearing. The issue to be resolved is not whether the payments are owed; they are, and that has already been determined. The issue is how to get the parent-debtor to pay. Whether the parent-debtor is held in contempt, his wages garnished, or his tax return intercepted is not decided by the custodial parent. That parent requests payment, and the state agency and the judge determine mode of collection. Thus, there is little reason to represent the custodial parent because his or her critical interest is the payment, not the manner in which it is obtained.

In *Turner*, for example, the records reflect that the judge and Turner exchanged very few words before the contempt order was entered.²⁸⁷ The judge did not question the custodial parent, and the custodial parent did not make any kind of statement. Even in Turner's later hearings, there is nothing in the record to suggest that the custodial parent was consulted. Custodial parents do not instigate the hearings in this process; the state does that. Concerns about the unrepresented custodial parent in a hearing that she did not request are rather misplaced.²⁸⁸

Finally, the system for collecting support payments disproportionately impacts poorer individuals.²⁸⁹ Seventy percent of the child support owed nationwide is owed by parents who have no reported income or who make less than \$10,000 per year.²⁹⁰ A 1997 study determined that of the 4.5 million noncustodial fathers who did not pay child support, 2.8 million of them

285 See *Turner v. Rogers*, 131 S. Ct. 2507, 2519, 2525–27 (2011).

286 See *Hatcher*, *supra* note 207, at 1029 (noting that “half of the \$105 billion in national child support debt is owed to the government”).

287 See *Turner*, 131 S. Ct. at 2513–14.

288 See Jane C. Murphy, *Legal Images of Fatherhood: Welfare Reform, Child Support Enforcement, and Fatherless Children*, 81 NOTRE DAME L. REV. 325, 373 (2005). (“Being forced into repeated court appearances with mother as plaintiff (although the state initiated the case) and father as defendant undermines relationships in these fragile families. . . . The mother’s name on the case may make it look like she instigated the case, though she actually has no control in the decision to begin a contempt action and is often not informed about the action until she, too, receives a summons.”). Moreover, the Court fails to recognize that even in the criminal justice system, where counsel is appointed to indigent defendants, the victim’s interest may not be completely protected or in line with the prosecution’s interest.

289 See Patterson Brief, *supra* note 192, at 7; Family Policy and Practice Brief, *supra* note 192, at 22–23.

290 *Turner*, 131 S. Ct. at 2518.

were poor.²⁹¹ Moreover, when the consequence of failure to pay is imprisonment, local penal institutions are disproportionately filled with individuals unwilling or unable to pay child support. For instance, some studies have determined that thirteen to sixteen percent of those incarcerated in the South Carolina county jail are parent-debtors.²⁹² What this means is that, as a result of the incentive structure created by federal financial assistance programs, states like South Carolina are pursuing and incarcerating poor fathers in staggering numbers. This kind of resource disparity is exactly what led the Court to adopt a right to counsel in the criminal context.²⁹³ As the *Gideon* Court explained, fairness “cannot be realized if the poor man . . . has to face his accusers without a lawyer to assist him.”²⁹⁴

B. *Disputed Issues Are Complex*

In order to provide fair hearings in this context, lawyers should be appointed to indigent individuals. While the Court took a rather dismissive view of the showing necessary to defeat finding of contempt in this context—recall Justice Sotomayor’s “blah, blah, blah” retort—what parent-debtors need to demonstrate is fairly complex. A number of legal issues can arise in these hearings—not just the factual question of whether an individual can pay the support payments or not.²⁹⁵ Questions of law, such as whether the admission of drug-use constitutes an inability to pay, are an example.²⁹⁶

Factual arguments can also be quite thorny. The argument, in the spirit of Justice Sotomayor’s comment, is that the inability to pay is easily shown. It is a “straightforward matter of assets, employment, and other sources of income. W-2 forms, paycheck stubs, tax returns, and notes from doctors or employers are simple documents that [parent-debtors] can bring and introduce themselves.”²⁹⁷ Yet, demonstrating inability to pay is really not that simple. As one scholar explained,

Even the simplest inability to pay argument requires articulating the defense, gathering and presenting documentary and other evidence, and

291 Elaine Sorensen & Chava Zibman, *Getting to Know Poor Fathers Who Do Not Pay Child Support*, 75 SOC. SERV. REV. 420, 422 (2001).

292 Family Policy and Practice Brief, *supra* note 192, at 2–3. The numbers in South Carolina are not unique. Other states, like Indiana, have large parent-debtor prison populations as well. See Patterson, *supra* note 104, at 117. In 2002, 2400–3300 parent-debtors were reportedly incarcerated in that state for non-payment, and eighty to eighty-five percent of those were pursuant to civil contempt. *Id.*

293 See Engler, *supra* note 9, at 79 (discussing that disparity in power between the unrepresented party and the party bringing the action necessitates a law because she can “neutralize the power that the unrepresented litigant typically encounters, providing a vulnerable, one-shot litigant with the benefits of repeat-player status”).

294 *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963).

295 See Oral Argument, *supra* note 190, at *59–*60 (listing potential legal questions that could arise at a hearing).

296 *Id.*

297 Brief of Respondents at 52, *Turner v. Rogers*, 130 S. Ct. 2507 (2011) (No. 10-10), 2011 WL 481836 [hereinafter Respondent’s Brief].

responding to legally significant question from the bench—tasks which are probably awesome and perhaps insuperable undertakings to the uninitiated layperson.²⁹⁸

In other words, it is just as difficult to show an inability to pay as it is to defend against a misdemeanor. If lawyers were necessary for even “petty” crimes, they are certainly necessary for proceedings like those in *Turner*. In fact, an attorney might have been able to help Turner demonstrate that he could not pay his outstanding support payments. At his hearing, Turner gave the family court a copy of his application for disability payments.²⁹⁹ It showed that he had no income.³⁰⁰ Yet, the court did not take that form into account.³⁰¹ Had an attorney been there, she might have been able to direct the court’s attention to the form and provide further corroborating evidence necessary to show Turner’s inability to pay.³⁰²

Turner’s story also provides an excellent example of how an attorney might have helped the court and the entire system reach a better result instead of additional incarceration. During the pendency of his appeal, Turner was once again summoned to the South Carolina family court.³⁰³ The pro bono counsel representing him on appeal attended that hearing. Counsel suggested that the court suspend Turner’s sentence contingent on Turner completing a substance abuse program.³⁰⁴ The court and DSS agreed to this proposal.³⁰⁵ On at least the four previous occasions that Turner had appeared before the family court, he was without counsel and was summarily sentenced to anywhere from six months to a year in prison.³⁰⁶ Yet, when he had counsel, the result of the same action was completely different.³⁰⁷

While the impact of an attorney in Turner’s case is anecdotal at best, the difference in results obtained with an attorney present is notable. In addition to these anecdotes, some studies have determined the presence of counsel makes a positive difference for the parent-debtor.³⁰⁸ For example, in one study looking at 326 obligors randomly selected in South Carolina, only

298 Patterson, *supra* note 104, at 121 (internal quotation marks omitted).

299 Reply Brief for Petitioner at 15, *Turner v. Rogers*, 130 S. Ct. 2507 (2011) (No. 10-10), 2011 WL 805230 [hereinafter Reply Brief].

300 *Id.*

301 *Id.*

302 *Id.* at 16.

303 Petitioner’s Brief, *supra* note 225, at 15 n.10.

304 *Id.*

305 *Id.*

306 *Id.* at 9–12.

307 Unfortunately for Turner, he was not successful in his treatment program and he was placed in jail again while his case was pending before the Supreme Court. *Id.* at 15 n.10. That fact should not affect the argument that attorneys can and do make a difference in this context. However, allegations about Turner’s ability to pay are made in Respondent’s Brief. The allegation was that Turner was selling prescription drugs illegally. Respondent’s Brief, *supra* note 297, at 12. The brief also alleged that Turner was able to post a \$10,000 surety bond when arrested for selling drugs to an undercover officer. *Id.*

308 See Patterson Brief, *supra* note 192, at 10.

twelve (or 4%) were represented by attorneys.³⁰⁹ The parents without counsel were held in contempt “more than twice as often as [those] who were represented by counsel.”³¹⁰ Only two of the twelve (or 17%) of the represented parents were held in contempt, while 131 of the 314 (or 42%) of the unrepresented parents were.³¹¹ The study noted that there were no appreciable differences between the financial situations of the parents represented by counsel and those that were not.³¹² The only consistent difference was whether counsel was present.³¹³

C. Case-by-Case Approach Should Be Rejected

This leads to the determination of complexity and whether courts should decide if attorneys are necessary on a case-by-case basis. As already discussed, the argument that contempt proceedings in this context are simple is dubious at best. Because of the inability to accurately assess complexity, the Court should eschew a case-by-case approach in this context.

Such an approach was initially embraced in the criminal context by the *Betts* Court, but later rejected in *Gideon*. The *Betts* Court feared the application of “hard and fast rules” because the danger of such rules was that the “qualifying factors” in any particular case would be ignored.³¹⁴ The Fourteenth Amendment would “prohibit[] the conviction and incarceration of one whose trial is offensive to the common and fundamental ideas of fairness and right,” such that the absence of counsel “in a particular case” might run afoul of the Amendment.³¹⁵ The Court was reticent to require counsel in every criminal case, however, because it was not convinced that the Fourteenth Amendment “embodie[d] an inexorable command that no trial for

309 *Id.*

310 *Id.*

311 *Id.*

312 *Id.* at 12.

313 *Id.* One response may be that any mistakes made in the contempt hearing can be corrected on appeal. But, this argument ignores the impact that lawyers have on creating a reviewable record. Without a lawyer present to create the record and raise the issues on behalf of her client, the record on appeal will appear quite uneventful to an appellate court. In other words, “[d]etermining the difference legal representation would have made becomes possible only through imagination, investigation, and legal research focused on the particular case.” *Lassiter v. Dep’t of Soc. Servs.*, 452 U.S. 18, 51 (1981) (Blackmun, J., dissenting). Because the appellate court is unable to know what happened at the lower court, it is truly unable to rigorously review the decisions made. The danger in this, of course, is that the legitimacy of the entire system is called into question. The chance of erroneous decisions is increased because of the absence of the lawyer. Relatedly, the ability to correct such deprivations on appeal is lessened because the lawyer was not there to raise critical arguments and facts necessary for an effective appellate court review. *See id.* (“Such failures, however, often cut to the essence of the fairness of the trial, and a court’s inability to compensate for them effectively eviscerates the presumption of innocence.”).

314 *Betts v. Brady*, 316 U.S. 455, 462 (1942).

315 *Id.* at 473.

any offense, or in any court, can be fairly conducted and justice accorded a defendant who is not represented by counsel.”³¹⁶

In *Turner*, the Court also provided for flexibility, requiring particular procedural safeguards and allowing courts to otherwise assess the necessity of counsel on a case-by-case basis.³¹⁷ Like *Betts*, the *Turner* Court opined that with certain safeguards, the “risk of an erroneous deprivation of liberty” would be “significantly reduce[d].”³¹⁸ And with a flexible rule, courts could assess what fundamental fairness required in each particular case and not be bogged down by lawyers in cases where they were not necessary.³¹⁹

A case-by-case approach in the criminal justice system was ultimately rejected because the Court realized the risk of unfairness was too high. One major reason is that the decision is left solely in the hands of one judge—a judge that risks being susceptible to significant bias. Beyond providing assistance to the individual, an attorney also acts as the judge’s conscience in these types of hearings. The judge may be unaware of her bias against an individual, but when an attorney is there to speak as an advocate for that person, the judge is less likely to give in to those tendencies. This is true in all cases, whether they be deemed simple or complex.³²⁰ The risk of a judge’s bias affecting her ability to decide whether counsel is necessary or not, and the associated risk the lack of an attorney will allow any such bias to go unchecked, requires the Court to forego a case-by-case approach in the civil context.

This concern is acute. The ability of the judge to honestly see what is simple or complex from the perspective of the individual before her is highly questionable. After all, judges are trained to think in legal terms, and what might be simple to them is certainly not so simple for laypeople.³²¹ In the study already discussed, court observers noted that parent-debtors with identical financial situations were treated differently by the same judge.³²² Where the parent was represented by an attorney, the judge did not hold the parent in contempt, but where another parent with indistinguishable financial facts appeared without an attorney, the judge held that particular parent in contempt.³²³ This further demonstrates that when the attorney is present, the

316 *Id.*

317 *See* *Turner v. Rogers*, 131 S. Ct. 2507, 2519 (2011).

318 *Id.*

319 *Id.*

320 *See* Engler, *supra* note 9, at 82 (“The importance of skilled advocates increases relative to the power stacked against the unrepresented litigants.”); Margit Livingston, *Disobedience and Contempt*, 75 WASH. L. REV. 345, 387 (2000) (criticizing Justice Blackmun’s opinion in *Bagwell* and noting that “[t]here seems to be just as much need for unbiased factfinding in the case of simple decrees as in the case of complicated ones”).

321 *See* Abel, *supra* note 149, at 9–10 (“[Judges] have experience in the workings of their own courtrooms and the caselaw, laws and rules used therein. And they do not have a large stake in the cases before them, unlike the litigants, who may have difficulty thinking clearly in a case involving the potential loss of . . . livelihood.”).

322 Patterson Brief, *supra* note 192, at 11.

323 *Id.*

court is more likely to engage the individual's argument and less likely to be dismissive on the basis of her own bias.

In addition, while the risk of bias exists in any court hearing, it is especially pronounced in the contempt context because the alleged contemnor is literally accused of flouting the court's order.³²⁴ As Professor Earl Dudley explained:

There is, however, no reason to believe that the pervasive difficulties afflicting the contempt process are absent whenever the sanction chosen is civil in form. A judge offended by perceived flouting of his authority . . . is no less likely to resolve factual issues in a biased manner simply because he chooses ultimately to impose a sanction designed to coerce obedience By carefully crafting the sanction [as civil, not criminal], a biased judge can drastically limit the procedural protections afforded the accused contemnor³²⁵

Without an attorney, any judicial bias aimed at the parent-debtor will go unchecked.

Finally, the judge also might not understand the complexity of what the parent-debtor is experiencing, and thus, might lump all non-paying parent-debtors into one homogeneous group.³²⁶ This results from understandable frustration.³²⁷ After all, the judge often only knows of an obligation and failure to pay; there is no advocate to explain the nuance in the cases before her.³²⁸ Moreover, in the eyes of society, the father who does not pay for child support is a stereotypical "deadbeat dad."³²⁹ Like all stereotypes, this label is dangerously generalized.³³⁰ At least thirty-three percent of these fathers are simply unable to pay because of their lack of income.³³¹ There

324 See Margaret Meriwether Cordray, *Contempt Sanctions and the Excessive Fines Clause*, 76 N.C. L. REV. 407, 415 (1998) (noting that the Court has acknowledged the propensity for bias on this basis in the criminal contempt context, but ignored the possibility in the civil one).

325 Dudley, *supra* note 205, at 1062–63. But, in the same article, Dudley doubted whether judicial bias would affect determinations made in family law "because imposing severe contempt sanctions is in tension with the ultimate goal of providing alimony and child support." *Id.* at 1076. He also stated that "jail sentences . . . will, in the vast majority of cases, impede the achievement of [the] objective [of providing child support for the child] by impairing, if not destroying, the defaulting parent's or former spouse's ability to pay." *Id.* Unfortunately, in Turner's case, and in countless others, Dudley's assessment of how the issue of contempt and child support would be handled by courts—and whether judicial bias might play a role—was inaccurate.

326 See Patterson, *supra* note 104, at 124.

327 See *id.* ("Caught up in the important goal of meeting the economic needs of America's children and the norms of parental responsibility, they can become frustrated with the repeated court appearances of obligors with huge arrearages, a history of nonpayment, and an endless stream of what seem to be excuses for not providing for their children.").

328 See *id.*

329 See Murphy, *supra* note 288, at 353–54.

330 See *id.*

331 *Id.* at 354.

are also the associated complexities attendant to that level of poverty—lack of education and employment opportunities, youth, and criminal histories.³³² Even with the most progressive of judges, it is difficult, if not impossible, to ignore this stereotype when presented with child support cases on a day-to-day basis. While such a bias might be explicable, it is certainly not acceptable. The addition of a lawyer would ease this bias effect. Also, taking away the judge's ability to decide on a case-by-case basis whether an attorney is necessary would ensure that her bias stays out of that determination process as well.

In sum, critical factors such as power and resource disparities, complexity, and judicial bias caused the Court to reframe its view of how the right to counsel should be applied in the criminal context. After all, erroneously imprisoning indigent individuals would call the legitimacy of the entire criminal justice system into question. The Court utilized these factors and its positive narrative of the lawyer to adopt a presumptive right to counsel. As it already has in the criminal justice system, the Court should similarly adopt this narrative and set aside the narratives it associates with traditional civil litigation. The issues—state power, complexity, and bias—are not meaningfully different in the civil context. And the consequence—prison—is identical. If the Court sheds the narratives that underlie its civil justice jurisprudence and views these cases for what they really are, it should determine counsel is necessary for indigent individuals in every case, civil and criminal alike.

D. A Doctrinal Path

Using a consequence-driven approach in the civil context should lead the Court to determine the appointment of counsel for indigent individuals is absolutely necessary whenever prison is the consequence. The next question is how the Court can get to that result under existing law. This Article argues that there are two doctrinal paths. One is to find that where liberty interests are at stake, and the power and authority of the state is largely behind the taking of that interest, the appointment of counsel should be presumptive. The second way is to find that under *Mathews* the appointment of counsel is required in order to mitigate an otherwise intolerable risk of error.³³³

332 *Id.*

333 Some scholars have proposed finding a right to counsel for indigent defendants based on an equal protection argument. *See, e.g.,* Bindra & Ben-Cohen, *supra* note 9, at 19–31. Because an equal protection approach has yet to gain any traction with the Court in this context, this Article will only address the potential due process arguments. Similarly, at least one scholar has argued that the Privileges or Immunities Clause can be used to argue for a broader access to courts. *See* Risa E. Kaufman, *Access to the Courts as a Privilege or Immunity of National Citizenship*, 40 CONN. L. REV. 1477 (2008). This argument has not been accepted by the Court, so its chance of being expanded to include a right to counsel as part of the broader access is minimal. Finally, at least one scholar has argued that a procedural due process right might be found in respective state constitutions. *See* Michael

The first path would literally carry forward the promise of the Court's language in *Lassiter*. There, the Court spoke of a "presumption that an indigent litigant has a right to appointed counsel only when, if he loses, he may be deprived of his physical liberty."³³⁴ That is exactly what is at issue in these cases—a deprivation of physical liberty that is necessitated by court action empowered by the state. This seems to be exactly what the Fourteenth Amendment should cover in the interest of ultimate fairness. And, prior to *Turner*, lower courts had followed this language from *Lassiter* and other civil cases to find a right to counsel in such situations.³³⁵ The *Turner* Court made a misstep by rejecting the express language of *Lassiter* and relying instead on a doctrine-oriented approach prioritizing efficiency over legitimacy. Had the Court followed *Lassiter* and a consequence-driven approach, it would have required counsel in *Turner's* case as a presumptive matter.

However, even if the Court were to reject a presumptive rule, it could still find that in cases like *Turner*, counsel is required under *Mathews*. The Court has already established that the liberty interest at stake is significant.³³⁶ As to the state's interest in the efficiency of its proceedings, there is little evidence in the record showing that the cost of providing counsel is prohibitive for the state. Assuming that it is, however, the interest in incarcerating parent-debtors is arguably high, as the state has an interest in making sure child support payments are made. Thus, the inquiry turns on whether the risk of an erroneous decision is significant and, if so, whether the procedural safeguard of an appointed attorney would necessarily lower that risk.

The analysis provided under the consequence-driven approach demonstrates that the risk of error is exceedingly high. The state is a powerful institutional player in the effort to jail the individual, the showing necessary to avoid contempt is quite complex, and the judge is not aware of her own bias in the hearing.³³⁷ These three factors combine to make the risk of error in the contempt proceedings far too high. Furthermore, the appointment of counsel would go a long way toward countering the problems created by the contempt process. The lawyer is there to act as a counter to the impressive power of the state, guide the parent-debtor through the complexity of the process, and check the judge's power.

Moreover, a true cost-benefit analysis under *Mathews* reveals that the *Turner* Court not only underestimated the benefit of adding attorneys to this process, but also grossly overestimated the cost of providing attorneys because it failed to recognize the overall cost of the contempt system in the child support collection context. First, there is an acute risk of inaccuracy in

Millemann, *The State Due Process Justification for a Right to Counsel in Some Civil Cases*, 15 TEMP. POL. & CIV. RTS. L. REV. 733 (2006).

334 *Lassiter v. Dep't of Soc. Servs.*, 452 U.S. 18, 26–27 (1981).

335 See Patterson, *supra* note 104, at 138–39 (noting that seven circuits have determined that in civil contempt hearings involving incarceration, indigent contemnors should receive appointed counsel).

336 See *Turner v. Rogers*, 131 S. Ct. 2507, 2518 (2011).

337 See discussion *supra* Part IV.A.–C.

the contempt determinations. When the indigent individual does not have an attorney, he is before the judge and against a well-resourced individual or government entity. This creates a major disparity in the adversarial process, putting the judge at a distinct disadvantage. The judge cannot act as both neutral arbiter and advocate for the accused, no matter how hard she may try. The judge simply does not get all the information needed to make an informed decision.³³⁸ In other words, the risk of error when indigent individuals do not have counsel is palpable because the whole structure of the adversarial system is to get the two sides to come forward with their best stories. When one side is debilitated by a lack of counsel, the risk of getting to an inaccurate result increases. This matters because of the cost of incarceration.

If the judge mistakenly determines the parent-debtor will not pay, as opposed to being unable to pay, that individual goes to prison. That incarceration comes with an incredibly large price-tag. The average cost per day of imprisoning one individual is about \$50.³³⁹ In Turner's case, he was ordered to pay \$51.73 per week (or \$7.39 per day) in custody payments.³⁴⁰ At the time he was sentenced to a year in prison (a prison term that he served in full), he owed \$6000.³⁴¹ That means the state of South Carolina paid \$18,250 in incarceration costs alone, and ultimately the state recovered not one penny of the \$6000 he owed. Assuming the family court got it right, the system already makes little sense economically. In Turner's case, however, the court got it wrong. Turner could not pay, and that mistake cost the state

338 See Earl Johnson, Jr., "And Justice for All" *When Will the Pledge Be Fulfilled?*, 47 JUDGES' J. 5, 9 (2008); see also Robert L. Rothman, *No House, No Custody, No Money, No Lawyer*, 35 LITIG. 1, 2 (2008) ("Despite the best efforts of many judges to be as fair and impartial as possible when they have a lawyer on one side of a case and a self-represented litigant on the other, equal justice—or the appearance of equal justice—is elusive.").

339 See Elaine B. Brown, *Smart on Crime*, RES GESTAE, June 2012, at 54, 51 (identifying an "average \$55-per-day-per-inmate cost to house"); JJ Hensley, *Ariz. Aims to Cut Prison Costs*; *In Texas, a New Approach*, AZCENTRAL.COM (Apr. 18, 2010, 12:00 AM), <http://www.azcentral.com/news/articles/2010/04/18/20100418arizona-prison-costs.html> ("Texas spent about \$3 billion in 2009 on its criminal-justice system, which included about \$42 per day to house the 172,000 prisoners in state custody."); Meredith Kleykamp et al., *Wasting Money, Wasting Lives*, DRUG POL'Y ALLIANCE 1, 7 (2008), available at http://www.drugpolicy.org/sites/default/files/WMWL_Final_2012.pdf (estimating the cost of imprisoning an individual in New Jersey at \$46,880 per year); Benjamin Pearson-Nelson, *Reentry Court Program Impact Evaluation*, ALLEN COUNTY COMMUNITY CORRECTIONS 1, 1 (2009), available at <http://www.allencountycorrections.com/pdfs/reports/ReEntry%20Court%20Impact%20Evaluation%2002%2004%2009.pdf> (estimating the cost of imprisoning an individual in an Indiana state prison at nearly \$53 per day); *Budget: Inmate Cost Per Day Over Five Years*, FLA. DEP'T OF CORRECTIONS, <http://www.dc.state.fl.us/pub/annual/0910/budget2.html> (last visited Apr. 6, 2013) (estimating the cost per day of imprisoning an individual in Florida at \$53.34 per day in FY 2009–10).

340 Petitioner's Brief, *supra* note 225, at 8. Imprisoning him for his daily payments cost the state much more than it (or the custodial parent and child) stood to gain. Thus, incarcerating him for failing to pay makes dubious economic sense.

341 *Id.* at 11.

in excess of \$18,000. Turner was just one individual in what is estimated to be 139,000 parent-debtors in South Carolina who are in arrears for child support payments.³⁴² Even if only a small percentage of those parent-debtors are held in contempt and incarcerated, the risk of error—the risk of getting the ability to pay determination wrong—is exceedingly high when compared to the cost of providing attorneys in these proceedings.

In sum, under a straightforward application of *Mathews*, contempt proceedings like the one at issue in *Turner* should result in a finding of the necessity of counsel every time. The Court did not get there, however, because instead of being guided by a consequence-driven approach that would have required it to take note of both the complexity of the cases and the inequities of the hearing dynamics, it adhered to its civil litigation narratives. This led it to mistakenly find that Turner was not deserving of counsel, but was instead only deserving of more procedural safeguards. In this case, that meant more detailed forms to fill out. This would not have been an adequate solution in the criminal justice system, and there is no reason to tolerate such a solution in the civil context either. After all, prison is prison.

V. TAKING THE DOCTRINE-ORIENTED CONCERNS SERIOUSLY

If the Court rejects its traditional civil litigation narratives, and thus rejects a doctrine-oriented approach, it will find that indigent individuals subject to prison in civil proceedings like Turner's should receive counsel. There are notable consequences of such a finding, however, that are worth taking seriously. This Part discusses the main concerns and concludes that even though some of the concerns are valid, the Court's most defensible position is to adopt a consequence-driven approach and find that appointed counsel is required.

A. *Expense of Providing Lawyers*

A state government paying to provide counsel is not a costless prospect. One tempting response is to argue that the state need not pay for attorneys because indigent defendants can depend on the Legal Services Corporation (LSC) attorneys or private sector pro bono hours. However, neither of these suggestions provides the amount of representation necessary to meet the needs of indigent individuals in civil litigation. First, Congress continues to cut funding for the LSC, and it is largely viewed as failing to provide the services necessary to meet its modest original mandate.³⁴³ Second, while

342 See *Turner v. Rogers*, 131 S. Ct. 2507, 2526 (2011).

343 Bindra & Ben-Cohen, *supra* note 9, at 4 (“Over the years, LSC, like many Congressional programs, has seen its funding cut. For example, LSC’s 1999 funding was at \$300 million, \$21 million below the 1981 level and far below the \$600 million that would be the inflationary equivalent of the 1981 level.”). In 1974, when the LSC was established, its goal was to provide “at least ‘minimum access’” to indigent individuals, meaning one lawyer per 5000 indigents. S. REP. NO. 104-392, at 25 (1996) (statement of Sen. Simon). As of 1996, funding only covered one lawyer per 10,000 indigents. *Id.* In 2007, that number was one

attorneys are generally willing to provide pro bono assistance, they simply cannot provide enough hours to meet the legal needs of indigent individuals.³⁴⁴

Thus, the question becomes one of how federal and state governments can afford to provide counsel, especially at a time when funding for public programs is so scarce.³⁴⁵ First, the true cost of providing counsel is not a simple calculation of how much a team of state attorneys will cost. The savings to the system must also be factored in. Child support is a perfect example. As explained above, a state like South Carolina spends enormous amounts of money to imprison parent-debtors, with little to show for it in the way of collection success.³⁴⁶ If the system functioned more efficiently because of the addition of attorneys, then the true cost of a right to counsel would be much smaller than anticipated.

Second, there is no empirical evidence to support the argument that a right to counsel in civil contempt hearings would be significant.³⁴⁷ The *Turner* Court discussed the monetary cost of providing counsel during oral argument, inquiring as to whether such cost had been computed.³⁴⁸ Ultimately, the Court did not explicitly address cost in *Turner*, but it still stated that the addition of lawyers would cause delay and destroy the informality of the state's systems, an implication that costs would increase without any benefit to the state.³⁴⁹ It did so, however, without any evidence to support its proposition. In point of fact, the evidence to the contrary is quite substantial.

lawyer per 12,025 indigents. See *Documenting the Justice Gap in America*, LEGAL SERVS. CORP. 1, 20 (2009), available at http://www.lsc.gov/sites/default/files/LSC/pdfs/documenting_the_justice_gap_in_america_2009.pdf (4231 attorneys working for LSC funded organizations and 50,876,000 people living at 125% of the federal poverty line). This puts the United States well behind other modern democracies in funding legal aid. See Johnson, *supra* note 338, at 7 ("The governments of many comparable industrial democracies such as England, France, Germany, the Netherlands, Canada, New Zealand, and even Hong Kong invest three to ten times more on civil legal aid as we do in the United States.").

344 See Bindra & Ben-Cohen, *supra* note 9, at 5–6 (summarizing the inability of many states to meet the needs of indigent parties with pro bono hours).

345 In *Gideon*, the Court did not discuss in depth the cost of providing counsel, nor did it discuss a host of other issues, including whether there were enough lawyers to fulfill the assistance of counsel requirement. But see *Argersinger v. Hamlin*, 407 U.S. 25, 56–58 (1972) (Powell, J., concurring in judgment) (noting the discussion of attorney supply and demand). The Court raised these issues, but did not solve them. Moreover, it did not see them as substantial enough to prevent the Court from making the right decision. See Abel, *supra* note 45, at 535–36 ("The *Gideon* opinion itself does not indicate why the Court decided to recognize the right to counsel despite these issues.").

346 See *supra* Part IV.D; see also Helaine M. Barnett, *An Innovative Approach to Permanent State Funding of Civil Legal Services: One State's Experience—So Far*, 17 YALE L. & POL'Y REV. 469, 470–75 (1998) (finding that it is possible for the funding of at least some legal services to result in overall cost-savings to the state).

347 The *Turner* majority argued it would be. *Turner v. Rogers*, 131 S. Ct. 2507, 2519 (2011); see Respondent's Brief, *supra* note 297, at 56–57, 61.

348 Oral Argument, *supra* note 190, at *52, *59–60.

349 *Turner*, 131 S. Ct. at 2519.

Studies of legal services have generally shown that when counsel assists indigent individuals, the overall cost to the system decreases.³⁵⁰

Third, society has to make difficult choices when it comes to the allocation of funds for programs. Often, however, it appears that funds are invested in interests that do not benefit the public at large. Right to counsel is no exception. Putting the cost of provision of counsel in context demonstrates that it pales in comparison to many of the other expenditures made at the federal, state, and local level.³⁵¹ These expenditures are important, but a civil justice system that functions fairly and legitimately is invaluable. To some degree, societal interest in a well-functioning civil justice system should trump other interests. Public sentiment demonstrates that this prioritization is an accurate one. At least one study has shown that almost eighty percent of the American public believes that they have a right to counsel if they are an indigent party in a civil proceeding.³⁵² The allocation of public funds should ensure this perception is a reality.

Finally, the need for equalization in representation can possibly be met by the excess of lawyers in our justice system. It is no secret that the legal job market has shifted greatly over the past decade. The contraction in the market means there are a number of well qualified attorneys that simply cannot

350 See *Legal Services Corporation: Hearings Before the H. Subcomm. on Commercial and Admin. Law of the Comm. on the Judiciary*, 106th Cong. 59 (1999) (statement of John Pickering, Member, American Bar Association's Standing Committee on Legal Aid and Indigent Defendants) ("Legal service programs encourage the swift resolution of disputes with minimum conflict; only about 10[%] of matters handled by programs are resolved through litigation."). There are many explanations for this decrease. One example is that the lawyer or agency bringing the action is more likely to respond to another attorney than she is to a pro se individual, meaning the parties will generally avoid litigation and its associated costs. See Engler, *supra* note 9, at 91. Engler argues, in the landlord/tenant context, that where tenants do not have counsel, landlords are more like to bring cases in court because even when they put in little time, they "typically prevail, regardless of the quality of their lawyer, the persuasiveness of their evidence, or the presence of a viable defense." *Id.* Engler argues that if counsel were provided tenants, landlords may be less likely to pursue litigation because they are "not prepared to prevail in a true adversarial trial." *Id.* Pro se parties also take additional resources from the system. See *Urban v. United Nations*, 768 F.2d 1497, 1499 (D.C. Cir. 1985) ("The problem we face today—that of a *pro se* litigant flooding the court with meritless, fanciful claims—is by no means new to this circuit."); *In re Martin-Trigona*, 737 F.2d 1254, 1259 (2d Cir. 1984) (discussing a pro se litigant's filing of over two hundred and fifty civil actions which were "pursued with persistence, viciousness, and general disregard for decency and logic" (internal quotation marks omitted)).

351 For example, one scholar estimated that the amount of money necessary to properly fund legal services for indigent individuals in the state of California was "miniscule" compared to the \$9.5 million dollar budget for MediCal and MediCare. Earl Johnson, Jr., *The Right to Counsel in Civil Cases: An International Perspective*, 19 LOY. L.A. L. REV. 341, 359 (1985).

352 Mary Deutsch Schneider, *Trumpeting Civil Gideon: An Idea Whose Time Has Come?*, 63 BENCH & B. MINN. (2006), available at <http://www2.mnbar.org/benchandbar/2006/apr06/gideon.htm> (last visited Apr. 6, 2013) (finding that 79% of citizens in a national survey responded "yes" when asked whether a poor respondent would have a right to free counsel if sued in a civil court).

find jobs sufficient to pay off their mounting law school debt.³⁵³ There is only one attorney for every 6861 people categorized as low income (compared to one attorney for every 525 people in the general population).³⁵⁴ Thus the legal need is most certainly there. The problem is that many lawyers cannot make a living working for a population with so little means. The medical profession has dealt with this reality by creating programs that allow doctors to go to areas of great medical need in exchange for the discharge of school debt. A similar program could be adopted in the legal context.³⁵⁵ There is not an unwillingness to serve the indigent market on the part of lawyers; there is simply an inability to do so. Providing financial incentives to junior attorneys would go a long way toward bringing the necessary number of attorneys into this area of need.³⁵⁶

B. Expansion Beyond Prison as a Consequence

Two opposing concerns arise from the argument that the right to counsel should be extended whenever an individual's liberty is at stake, whether it be in the civil or criminal context. The first is that if the right is extended in one particular civil context, it might be extended to others. In *Turner*, immigration was the major concern.³⁵⁷ A related concern is that once there is a right to counsel in the civil context, other rights, such as the right to a jury trial, must necessarily follow. On the other side of the spectrum is the concern that extending the right to counsel to cases where liberty is at stake does not go far enough.

353 There is a "surplus" of attorneys. Catherine Rampell, *The Lawyer Surplus, State by State*, N.Y. TIMES ECONOMIX, (June 27, 2011, 11:00 AM), <http://economix.blogs.nytimes.com/2011/06/27/the-lawyer-surplus-state-by-state>.

354 Abel, *supra* note 45, at 527.

355 See, e.g., Gregory M. Zlotnick, *One Day, All Americans . . . : Considering a TFA-Style Lawyer Corps*, 23 GEO. J. LEGAL ETHICS 971 (2010) (discussing the possibility of a lawyer service program modeled on the Teach for America program).

356 See Deborah L. Rhode, *Whatever Happened to Access to Justice?*, 42 LOY. L.A. L. REV. 869 (2009) (arguing for alternative reforms in order to deliver on the promise of access to justice); Thomas D. Rowe, Jr., *If We Don't Get Civil Gideon: Trying to Make the Best of the Civil Justice Market*, 37 FORDHAM URB. L.J. 347 (2010) (articulating alternatives to providing counsel in each civil case, such as broader access to self-representation tools).

357 See Respondent's Brief, *supra* note 297, at 40–42. The Court also took into account a slippery slope argument made by the United States as amicus. See Brief for the United States as Amicus Curiae Supporting Reversal at 31–32, *Turner v. Rogers*, 131 S. Ct. 2507 (2011) (No. 10-10), 2011 WL 108380. One of its major concerns was the expansion of right to counsel into immigration cases. *Id.* "The due process guarantee of fundamental fairness does not mandate the appointment of counsel in [removal] proceedings, which would be contrary to the judgment of Congress." *Id.* at 32. While the Court did not explicitly address this issue in its opinion, the potential expansion of the right to counsel into other civil proceedings most certainly affected its ultimate resolution of the case. See Respondent's Brief, *supra* note 297, at 18 (applying the right to counsel to civil contempt hearings "would blur the venerable distinction between criminal and civil contempt, inviting extension of a host of criminal procedures to various civil cases, such as immigration detentions").

In short, these concerns should not impact the arguments made in this Article. First, to the extent a civil proceeding results in the loss of liberty, this Article argues that the right to appointed counsel should attach. If an immigration proceeding results in detention, then counsel should be provided.³⁵⁸ Second, the Court is perfectly capable of taking the “other rights” into account separately. This may mean some rights will be found in civil proceedings where they have not existed before, but it may also mean they will not. For example, when the Court found a right to counsel in *Gault*, it later refused to find a right to a jury trial in juvenile detention cases.³⁵⁹ The Court determined the concerns attendant to right to counsel cases—resource disparities, accuracy concerns, etc.—were not at issue when determining whether a jury trial was required.³⁶⁰ One may either agree or disagree with the Court’s decision on that matter, but the point is that the Court was able to carve out certain “criminal” rights from civil hearings, even when it had granted the right to counsel.³⁶¹

Finally, as for the argument that the right to counsel should be extended even farther, it is simply beyond the scope of this Article. While entirely sympathetic to the argument that the loss of one’s home or essential possessions can be more devastating than being incarcerated, this Article is arguing from a slightly different vantage point. The Article’s basic argument relies on the premise that the Court uses different narratives in criminal and civil right to counsel cases where liberty is at stake. This is driven by the Court’s hostility to civil litigation. This Article contends that hostility should not apply when state power is being used to take away an individual’s liberty. Whether that argument can be expanded to other rights like property is for another day.³⁶²

358 See generally Daniel Kanstroom, *The Right to Deportation Counsel in Padilla v. Kentucky: The Challenging Construction of the Fifth-and-a-Half Amendment*, 58 UCLA L. REV. 1461 (2011) (arguing that the Court may have identified a broad right to counsel when immigration proceedings may result in detention or deportation). Kanstroom argues that *Padilla v. Kentucky*, 130 S. Ct. 1473 (2010), may be read to create a right to counsel in civil deportation proceedings. *Id.* at 1505. He uses the *Padilla* decision to challenge formal doctrinal distinctions between the civil and criminal settings in which deportation, as a consequence, may arise. *Id.* at 1505–06.

359 See *McKeiver v. Pennsylvania*, 403 U.S. 528, 545–51 (1971) (rejecting the application of the Sixth Amendment’s right to a jury trial to juvenile proceedings).

360 *Id.* at 543–48.

361 Similarly, in the criminal context, the Court did not extend the right to counsel to cases where monetary fines were the penalties. See *Scott v. Illinois*, 440 U.S. 367, 373 (1979) (“*Argersinger* has proved reasonably workable, whereas any extension would create confusion and impose unpredictable, but necessarily substantial, costs on [fifty] quite diverse [s]tates.”).

362 Many scholars have, in fact, argued that because the loss of property or other essential possessions can be worse than a short criminal incarceration, counsel should be provided. See, e.g., Beverly Balos, *Domestic Violence Matters: The Case for Appointed Counsel in Protective Order Proceedings*, 15 TEMP. POL. & CIV. RTS. L. REV. 557, 558 (2006) (arguing for right to counsel for battered individuals seeking protective orders from domestic violence because such individual liberty is at stake by virtue of the physical threat they face); David

C. *Quality of Lawyers*

One major criticism of appointed counsel in the criminal justice system is the quality of the lawyering. This is a valid concern and one certainly apropos to whether counsel should be appointed in civil proceedings. Challenges in the criminal justice system include attorneys with too many cases, lax quality and assessment standards for the attorneys, and a failure to fairly represent the individuals.³⁶³ These same concerns will likely apply in the civil context as well. For example, in states where attorneys are provided to indigent parent-debtors, these kinds of problems have been documented.³⁶⁴ Thus, the issues that arise in the criminal justice system will certainly obtain in civil proceedings.

These challenges, however, cannot be used to deny an individual her rights. The inability of the government to execute on what is right should not be used as an excuse for not making the decision that is both substantively and logically correct. Moreover, there is a difference in magnitude between the needs in the criminal and civil context. The amount of lawyers necessary to address the needs of indigent defendants in this particular civil context—where incarceration is the consequence—will be much lower than the number of lawyers necessary for the entire criminal justice system. Finally, solutions are being pursued in the criminal context, so there is no

Medine, *The Constitutional Right to Expert Assistance for Indigents in Civil Cases*, 41 HASTINGS L.J. 281, 321 (1990) (“Deprivation of an indigent’s property rights . . . may be more significant than a minor intrusion on an indigent’s liberty interest.”); Rothman, *supra* note 338, at 1 (arguing that the loss of basic necessities can be worse than going to prison); Note, *The Indigent’s Right to Counsel in Civil Cases*, 76 YALE L.J. 545, 554 (1967) (“Presumably the only line which could be drawn within [the civil litigation] area would set a minimum on the financial stake which would compel appointment of counsel. Any such criterion ignores the crucial factor of relative poverty; to a very poor man, fifty dollars may make a great deal of difference.”). But see D. James Greiner & Cassandra Wolos Pattanayak, *Randomized Evaluation in Legal Assistance: What Difference Does Representation (Offer and Actual Use) Make?*, 121 YALE L.J. 2118, 2118 (2012) (finding, in a preliminary study of the Harvard Legal Aid Bureau in unemployment dispute cases, the offer of representation by the clinic had no “statistically significant effect on the probability that unemployment claimants would prevail”).

363 See *supra* note 46 and accompanying text; see also Brief for Law Professors Benjamin Barton & Darryl Brown as Amici Curiae in Support of Respondents at 18, *Turner v. Rogers*, 131 S. Ct. 2507 (2011) (No. 10-10), available at http://www.americanbar.org/content/dam/aba/publishing/previewbriefs/Other_Brief_Updates/10-10_RespondentAmCuLaw_ProfsBartonandBrown.authcheckdam.pdf (“Expanding the right to appointed counsel to include child support enforcement proceedings will only exacerbate the problems facing this overburdened system [in the criminal justice context].”). But, these concerns are not necessarily endemic. In other words, there are many success stories within the criminal justice system as well. See Barton, *supra* note 46, at 1230 (noting that in spite of “distressing” facts and anecdotes about criminal defense attorneys, there were also a number of spectacular, dedicated attorneys as well).

364 Patterson, *supra* note 104, at 139 (noting that researchers observing the use of appointed counsel in child support contempt hearings believed that the lawyers were just meeting, or had just met, their clients before the hearing).

reason to think that those same solutions (and successes) would not apply in the civil context as well.³⁶⁵

D. *Efficacy of Child Support Collection*

It is debatable whether contempt is an effective means of collecting child support from the poorest parent-debtors.³⁶⁶ Some states, like Illinois, are re-examining the use of contempt hearings in their overall assessment of how best to collect child support.³⁶⁷ There are other ways to make sure that children are cared for that do not require jailing non-custodial parents. The suggested reforms are beyond the scope of this Article, but they include getting rid of the welfare-recovery systems and replacing them with a system that

365 See *supra* note 46 and accompanying text.

366 Hatcher, *supra* note 207, at 1031–32 (2007). Notably, “half of the \$105 billion in national child support debt is owed to the government rather than to children.” *Id.* at 1029; see also Family Policy and Practice Brief, *supra* note 192, at 25 (“The child support field itself has come to recognize that the accumulation of large arrearages by low-income fathers is counterproductive to program goals.”); Patterson, *supra* note 104, at 97 (“[Incarceration of parent-debtors] is a social failure because it does little to generate child support payments, and it increases the economic marginalization of the persons whose economic success is critical to achieving the goals of the program.”). But see *Turner v. Rogers*, 131 S. Ct. 2507, 2526–27 (2011) (Thomas, J., dissenting) (noting that some states report success in using incarceration and civil contempt in child support collection efforts); Respondent’s Brief, *supra* note 297, at 7–8 (arguing that non-custodial parents opt out of work to avoid paying support, making the threat of prison an effective tool in collecting support). In a survey done by the federal government, eighteen states responded to say that they use incarceration when necessary and that it works. *Id.* at 7.

367 Patterson, *supra* note 104, at 132 (“Mandatory contempt laws . . . should be modified to allow an assessment of the defendant’s means for reaching program goals prior to the filing of a contempt action.”); see also Hatcher, *supra* note 207, at 1073 (finding that in Title IV-D cases in 2006, the federal government determined that for the \$354 dollars per case it spent administratively to collect child support, it recovered roughly \$363 per case); *Turner v. Rogers Anniversary Forum: Fundamental Fairness and the Ability to Pay in Child Support Proceedings*, ADMIN. FOR CHILDREN & FAMILIES, <http://events.r20.constantcontact.com/register/event?oeidk=a07e5xnwsuk54634bab&llr=vt7m85dab> (last visited Apr. 6, 2013) (discussing a webcast from 2012 co-sponsored by the Office of Child Support Enforcement and Department of Justice’s Access to Justice Initiative concerning the effects of *Turner*). Illinois studied the effectiveness of its overall contempt system, including the use of incarceration, and found that other methods might work better. *Id.* For example, in 2010 in Illinois, courts issued 5,960 orders to show cause. *Id.* Of those orders, 3000 made it to a court hearing and 791 of those 3000 made a subsequent payment. *Id.* These efforts recovered \$520,000 in support payments, but cost the state \$835,000. *Id.* Notably, the \$835,000 estimate did not even include the cost of incarcerating any individuals who violated their child support orders, so the actual cost was even higher. *Id.* The stark reality of how poorly the contempt systems work has led many states, like Illinois, to re-think how they approach child support recovery efforts. It implemented an early intervention system. *Id.* The state agency workers were asked to delve into the parent-debtor’s ability to pay at the outset, instead of setting unreasonable payment expectations that would inevitably lead to court proceedings. *Id.* This has significantly decreased the amount of cases referred for contempt from 500 cases per month in 2010 to 122 per month in 2012. *Id.*

is more proactive in determining what amount indigent parents can really pay, helping parent-debtors better understand how to have their payments modified, and finding ways to more accurately assess what the parent-debtors can pay.³⁶⁸

But, even states that have adopted different systems use contempt sparingly.³⁶⁹ Failure to pay child support is a nuanced issue, and what policy is best should be left to the policymakers and further study. A consequence-driven approach will require, however, that if contempt and the threat of prison is the best policy choice, the system should provide attorneys to indigent individuals as a matter of law.

CONCLUSION

Where an individual's liberty is at stake, the system should do all it can to ensure fairness prevails. This premise is the basis for the Court's landmark *Gideon* decision. Yet, when the same situation is presented in the civil as opposed to the criminal context, the Court allows its hostility toward civil litigation to color its analysis. Instead of reaching a just result when the same circumstances present, the Court uses a doctrine-oriented approach to reject counsel for indigent individuals who are incarcerated. The Court's approach is indefensible. Instead of allowing the narratives of traditional litigation to affect its analysis, it should be guided by the consequences of the proceeding before it. Where the individual is subject to incarceration and indigent, she should have a right to appointed counsel, regardless of the nature of the proceeding. Indigent individuals and the greater public know that prison is prison. The time has come for the Court to face the same reality.

368 See Hatcher, *supra* note 207, at 1082–85; Patterson, *supra* note 104, at 107–15.

369 See *supra* note 367. But see Margaret M. Mahoney, *The Enforcement of Child Custody Orders by Contempt Remedies*, 68 U. PITT. L. REV. 835, 853 (2007) (“[T]he entry of remedial orders in custody and visitation enforcement proceedings serves to strengthen the judicial system.”). Moreover, according to Mahoney, the private interests—or the best interests of the child—are served as well. *Id.* However, Mahoney did not separately address the issue of contempt orders in the context of indigent parent-debtors, and her support of the civil contempt remedy was in the broader context of violations of parenting plans (including the failure to turn the child over to the other parent under such a plan).

